(1)

No. 96-7171-CFH Title: Randy G. Spencer, Petitioner
Status: GRANTED v.
Mike Kemna, Superintendent, Western Missouri Correctional Center

Docketed:
December 24, 1996 Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Simon,John William

Counsel for respondent: Spillane,Michael J.

Entry	Date	Note	Proceedings and Orders
1	Dec 18 1996	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due January 23, 1997)
3	Jan 10 1997		Waiver of right of respondent Michael Kemna, Superintendent to respond filed.
4	Jan 16 1997		DISTRIBUTED. February 14, 1997 (Page 21)
5	Feb 13 1997	F	Response requested -- JPS.
6	Mar 12 1997		Brief of respondent Michael Kemna, Superintendent in opposition filed.
7	Mar 20 1997		Reply brief of petitioner Randy Spencer filed.
8	Mar 27 1997		REDISTRIBUTED. April 11, 1997 (Page 18)
10	Apr 14 1997		Petition GRANTED. SET FOR ARGUMENT November 12, 1997. **********
11	Apr 25 1997	G	Motion of petitioner for appointment of counsel filed.
12	May 12 1997		DISTRIBUTED. May 15, 1997 (Page 13)
13	May 19 1997		Motion for appointment of counsel GRANTED and it is ordered that John William Simon, Esquire, of Jefferson City, Missouri, is appointed to serve as counsel for the petitioner in this case.
15	May 28 1997		Order extending time to file brief of petitioner on the merits until June 13, 1997.
16	Jun 10 1997		Joint appendix filed.
17	Jun 13 1997		Brief of petitioner Randy Spencer filed.
18	Jul 24 1997		Brief amici curiae of California, et al. filed.
20	Jul 24 1997		Brief of respondents Michael Kemna and Jeremiah Nixon filed.
19	Jul 28 1997		LODGING by respondent. Twelve copies of booklet, "Rules and Regulations and Guidelines Governing the Granting of Paroles, Conditional Releases and Related Procedures."
21	Aug 22 1997	G	Application (A97-149) to extend the time to file a reply brief from August 25, 1997 to September 8, 1997, submitted to Justice Thomas.
22	Sep 5 1997		Application (A97-149) granted by Justice Thomas extending the time to file until September 8, 1997.
23	Sep 8 1997		Reply brief of petitioner Randy Spencer filed.
24	Sep 16 1997		CIRCULATED.
26	Sep 29 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Eighth Circuit.
25	Oct 2 1997		Record filed.
		*	Original record proceedings United States District Court

2 pp

No. 96-7171-CFH

Entry	Date	Note	Proceedings and Orders
			for the Western District of Missouri.
28	Nov 5 1997		Letter from counsel for repondent received and distributed.
27	Nov 12 1997		ARGUED.

(2)

No. 96-____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

RANDY G. SPENCER,

Petitioner,

v.

MICHAEL L. KEMNA and JEREMIAH W. (JAY) NIXON,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

INGLISH & MONACO, P.C.

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26 pp

Questions Presented for Review

I. Whether a state attorney general's office and a district court may delay the response and disposition in a habeas corpus action until the petitioner's claim is arguably moot, then rely on the asserted mootness resulting from their delay to deny relief.

II. Whether the court below erred in holding--in conflict with the Second, Seventh, and Ninth Circuits--that a habeas corpus petition challenging a parole revocation is "moot," when the petitioner was undisputedly in custody under color of the revocation when he filed the petition.

Table of Contents

Table of Authorities

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

Petitioner, Randy G. Spencer, prays the Court for its order granting a writ of certiorari to review the judgment of the court below affirming the district court's denial, as moot, of his petition for a writ of habeas corpus.

Opinions Below

The decision of the United States Court of Appeals for the Eighth Circuit appears at 91 F.3d 1114 (8th Cir. 1996). App. 1-8. The one-page order of the district court is unreported. App. 9.

Jurisdictional Statement

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 2, 1996. That court denied the petition and suggestions on September 19, 1996. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

Section 1 of the fourteenth amendment to the Constitution of the United States provides, to the extent it has been invoked in the court of appeals, that: "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

Subsection (a) of 28 U.S.C. § 2254 provides, in relevant part, that "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Local Rule 13.C. of the Rules of United States District Court for the Western District of Missouri provides as follows:

> Suggestions in Opposition. Within twelve (12) days from the time the motion is filed, each party opposing the motion shall serve and file a brief written statement of the reasons in opposition to the motion.

Statement of the Case

As the petitioner has documented in the appendix and explains in this statement, he sought a writ of habeas corpus from a federal district court to challenge the State's revocation of his parole without providing him a preliminary revocation hearing on the most serious of the charges against him, and without affording him the opportunity to cross-examine any of the witnesses against him. Respondents and the district court delayed the habeas corpus action until the petitioner was again released on parole. The district court waited to render a decision until the petitioner had also served the entire term--imprisonment and parole supervision--under which he had been on parole when the State initiated the revocation proceedings in question. The district court then dismissed the action as moot. When the petitioner appealed the dismissal, the court below refused to address his strategic delay grievance, and held that the prejudice the revocation would cause him in future parole considerations did not overcome the "mootness" the respondents and the district court had created.

On June 3, 1992, the petitioner was on parole from two (2) sentences of three (3) years for burglary in the second degree and stealing over $150. App. 56-62. According to a parole violation report, there was a police report which said that on that date, the petitioner met a woman at a crack house; that after smoking crack cocaine, she took the petitioner home with

her; and that he raped her, and had her drive him back to the crack house. App. 60-61.

On July 16, 1992, officers of the Kansas City, Missouri, Police Department arrested the petitioner on a "twenty-hour hold" in connection with the alleged rape of the woman from the crack house. App. 60. The next day, the petitioner's parole officer issued a warrant for his arrest, charging that he had violated two (2) conditions of his parole by committing the crime of rape, and by possessing and using crack cocaine. App. 89. The parole officer interviewed the petitioner, and tendered him a waiver of a preliminary revocation hearing on the two (2) alleged violations. According to the petitioner's undisputed account of the interview, the officer told him that the waiver was "only a formality." App. 66. Petitioner signed the waiver. App. 90. The parole officer reported that the petitioner had been convicted of sodomy in 1983, had received a sentence of imprisonment for five (5) years, and was a "registered sex offender." App. 62. Nonetheless, the parole officer recommended that the Board continue the petitioner on parole pending the prosecutor's decision whether to charge him with raping the woman from the crack house. App. 62.

On August 6, 1992, the parole officer issued a violation report charging the petitioner with a third violation of his parole: using a dangerous weapon. The violation report said the police report said the woman from the crack house said that the petitioner had "pressed" the screwdriver against her side, but

that she "wasn't clear at what point that happened." App. 61. Petitioner did not execute a waiver of a preliminary revocation hearing on this third charge. App. 67.

If a Missouri jury had believed that the petitioner had raped the woman from the crack house; that a screwdriver was a "deadly weapon or dangerous instrument"; and that the petitioner had "display[ed]" it "in a threatening manner" during the rape, this additional charge would have aggravated the case against the petitioner from an unclassified felony to a "class A" felony. Mo. Rev. Stat. § 556.030.2 (Supp. 1992). If the jury had found that a screwdriver was a "dangerous instrument or deadly weapon," and that the petitioner had raped the woman from the crack house "by, with, or through the use, assistance, or aid" of the screwdriver, the petitioner could also have been convicted of the separate felony of "armed criminal action." Mo. Rev. Stat. § 571.015 (1994). As a "class A" felon, the petitioner would received a sentence of not less than ten (10) years or as long as life imprisonment. Mo. Rev. Stat. § 558.011.1(1) (Supp. 1992). For "armed criminal action," the petitioner would have received not less than three (3) years up to life imprisonment, with this term to run consecutively to the term for the underlying felony. Mo. Rev. Stat. § 571.015.1 (1994). Thus, the additional charge changed the petitioner's sentencing exposure from a minimum of five (5) years to a minimum of thirteen (13) years and the potential for two (2) consecutive life sentences.

On August 25, 1992, corrections staff transferred the

petitioner from the local jail to the Department of Corrections. App. 56 & 68. On September 14, 1992, an institutional parole officer told him that his final revocation hearing would be in ten (10) days; that the petitioner was responsible for obtaining any witnesses he wanted to call at the hearing; and that he could have one stamp and one telephone call with which to do so. App. 51 & 69. Relying on a state parole regulation to the effect that persons accused of parole violations "may have a representative of their choice" at the final revocation hearing, the petitioner requested the presence of an inmate paralegal at the institution; the Board denied the request. App. 92.

At the hearing on September 24, 1992, the State called no witnesses. It presented no "evidence" besides the violation report. At no point was the petitioner afforded the opportunity to cross-examine either his accuser or those who reported her out-of-court statements or the person who reported his asserted confession to having smoked crack cocaine. On the rape and armed criminal action charges, the only "evidence" that the petitioner had violated the terms of his parole were the out-of-court statements of the parole officer as to the out-of-court statements of unnamed police officers as to the out-of-court statements of the petitioner's accuser as to what she recalled happened when she was smoking crack cocaine. On the drug charge, the only evidence was the parole officer's out-of-court statement that the petitioner had admitted smoking the substance--which the petitioner denied. App. 72.

The Board revoked the petitioner's parole, relying on all three (3) of the asserted violations. It expressly based its findings on the initial violation report:

> Evidence relied upon for violation is from the Initial Violation Report dated 7-27-92.

App. 50. Petitioner did not receive a copy of the order revoking parole and setting forth the Board's basis for doing so until four months after the hearing. App. 78 & 93. At that time he also received notice that the Board had "automatically" extended his incarceration from his "conditional release" date of October 16, 1992, to his maximum release date of October 16, 1993, before the hearing on the revocation--solely on the basis of the violation report. App. 73-83, 90 & 94. See Mo. Rev. Stat. § 558.011.4-5 (Supp. 1992)(defining "conditional release" and prescribing procedure to be followed in extending it). Subsequently the State mitigated the effect of this action by finding the petitioner eligible for statutory "good time," Mo. Rev. Stat. § 558.041 (Supp. 1992), allowing him to be released on parole once more on August 7, 1993. App. 47.

Petitioner presented his constitutional grievances concerning the parole revocation in successive habeas corpus petitions before the circuit court of the county in which he was then a prisoner, before an intermediate appellate court, and before the Supreme Court of Missouri. App. 16-18, 39-40 & 83-84. All three (3) courts denied relief.

Three (3) days after the Supreme Court of Missouri denied

relief, the petitioner executed an application for a writ of habeas corpus from the United States District Court for the Western District of Missouri. App. 18 & 21. Petitioner raised four (4) grounds for relief:

> 1. The Board denied him his right to a preliminary revocation hearing on the armed criminal action charge, in that he had a right to such a hearing and did not waive it as to this additional charge.
>
> 2. The Board denied him a hearing on the cancellation of his conditional release date.
>
> 3. The Board denied him the minimum due process rights concerning his final revocation hearing, in that:
>
> a. It denied him the right to confront and cross-examine any of the witnesses against him, but relied solely on the out-of-court statements in the initial violation report.
>
> b. It gave him no notice that the entire case for revoking his parole would be the out-of-court statements in the violation report.
>
> c. It denied him the right to representation by a person of his choice.
>
> 4. The Board failed to apprise him of the fact of its decision to revoke his parole, and of the evidence it relied on in doing so, for four (4) months, when its regulations required that such a statement be prepared within ten (10) working days of the hearing, and that the parolee be provided this statement within ten (10) working days from the date of the decision.

App. 19-20.

On April 1, 1993, the district court filed the application, and the Pro Se Office of the clerk of that court assumed jurisdiction over the cause. App. 12. On April 5, 1993, the district court directed the petitioner to file an affidavit establishing his in forma pauperis status; he did so three (3) days later. App. 12 (Doc. Nos. 2-3). Nearly a month later, the district court ordered the respondents to file an answer within thirty (30) days of its order. App. 22-23.

On May 1, 1993, an Assistant Attorney General filed a motion for extension of time to file the respondents' answer to the district court's order. App. 24-26. The motion recited the following reason:

> That counsel has, within the past weeks, filed numerous responses in federal habeas corpus cases, written and filed numerous briefs, and prepared for and made several oral arguments in the various courts in the State of Missouri. Due to this litigation, respondent has been delayed in the completion of his brief in the above-styled case.

App. 24.

Under Local Rule 13.C. of the United States District Court for the Western District of Missouri, the petitioner had an initial period of twelve (12) days in which to respond to this motion. Because the respondents' counsel served the motion on the petitioner by mail, the petitioner had an additional three (3) days in which to respond. Fed. R. Civ. P. 6(e). Petitioner's response was therefore due fifteen (15) days after service of the respondents' motion. Petitioner filed his

response on June 8, 1993--a week after the respondents filed their motion. App. 28-29. On June 3, however, the district court had granted the respondents' motion by signing their draft order. App. 27.

Respondents' first motion for extension of time had sought, and obtained, an additional twenty-one (21) days. On Day 21, however, another Assistant Attorney General entered his appearance as counsel for the respondents. App. 32. The same day, he filed a second motion for extension of time--seeking an additional fourteen (14) days. Like his predecessor, the second Assistant Attorney General pleaded:

> That counsel has, within the past weeks, filed numerous responses in federal habeas corpus cases, and has written and filed numerous briefs in the Eighth Circuit Court of Appeals and has prepared for and made several oral arguments in the Eighth Circuit. Due to this litigation, respondent has been unable to complete the response in the above-styled case[.]

App. 30. Once more, the petitioner filed a timely objection--pointing out that in both instances the successive attorneys for the respondents had waited until the last day to file their motions for additional time, when in fact the generalized reasons they pleaded were, if true, well known to them in advance. App. 33-36. The same day, the district court issued a form order granting the extension. App. 37.

On the last day allowed for filing an answer--July 7, 1993--the respondents filed a response noting that "petitioner has been scheduled for parole release on August 7, 1993." Respondents

observed, as well, that "petitioner will complete the service of his entire term of imprisonment on October 16, 1993." App. 38 n.1.

A week after the respondents filed their answer, the petitioner filed a reply--starting and finishing by calling the district court's attention to the impending date of his release, and to the threat that his grievances would be held moot. App. 64-65 & 89. Petitioner addressed the respondents' answer by buttressing his petition with exhibits, with discussions of this Court's decisions in Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973), and with citations to several lower-court decisions applying these precedents. App. 65-89.

The day after the petitioner filed this pleading, the district court ordered him to file a "reply" to the respondents' response on pain of dismissal. App. 95. On July 22 the petitioner wrote the district court a letter, and on July 26 he filed a pleading, pointing out that his pleading of July 14 had included a reply to the respondents' response. App. 96-97.

On August 7, 1993, the State released the petitioner on parole. App. 38 n.1. On August 13, 1993, he filed a notice of change of address reflecting that he was no longer in prison. App. 98. On October 16, 1993, the full term of his concurrent sentences for burglary and stealing expired. App. 38 n.1.

On February 3, 1994, the district court issued a one-paragraph order "not[ing]" that the petitioner had filed his

pleading of July 14, 1993, in which he had sought an adjudication of his parole-revocation claims before he was released on parole again and before his entire sentence had expired. The order recited that "[t]he resolution of this case will not be delayed beyond the requirements of this Court's docket." App. 99.

On August 23, 1995--over two (2) years and four (4) months after the petitioner filed his application--the district court issued a one-page order denying relief. Relying on the respondents' response concerning the petitioner's then-forthcoming release on parole, it held that the petitioner's grievances had become moot. App. 9. On October 5, 1995, the district court summarily denied the petitioner's application for a certificate of probable cause--reciting that "this case presents issues which are not deserving of appellate review[.]" App. 100-01.

The United States Court of Appeals for the Eighth Circuit granted a certificate of probable cause. By the time of the appeal, the petitioner was once more in the Missouri Department of Corrections on an unrelated charge. On appeal, the petitioner argued, first, that the respondents should not be allowed to avoid his grievances on the ground of mootness, because the respondents' delays contributed to the alleged mootness; second, that the petitioner's case fell within an established exception to the principle of mootness where the public interest requires that an issue be decided notwithstanding its apparent mootness in an individual's case; and third, that the petitioner's grievances were not moot, because under the facts and circumstances of his

case, the past revocation of his parole would make it less likely for him to receive parole consideration again.

The panel of the court below held that under this Court's decision in Lane v. Williams, 455 U.S. 624 (1982), the ongoing consequences of the petitioner's parole revocation were "too speculative to overcome a finding of mootness." App. 3-6. It found that there was not a "reasonable likelihood" that the petitioner would "once again be affected by the Board's revocation procedures." App. 6-7. At no point in its opinion did the panel address the strategic delay grievance which the petitioner had repeatedly raised pro se, and which had been appointed counsel's first argument on appeal. App. 1-7. In a separate opinion, Senior Judge Heaney characterized it as "unfortunate" that the petitioner's claim had been mooted by delays in the district court, and observed that his case "highlights the necessity of making prompt decisions in revocation cases." App. 7-8.

Petitioner filed a petition and suggestions, seeking rehearing and rehearing en banc. App. 102-10. He emphasized the panel's failure to address the strategic delay issue. App. 105 & 107-08. On September 19, 1996, the court below denied rehearing and rehearing en banc. App. 10.

This timely petition followed.

Argument

I. A state attorney general's office and a district court may not delay the response and disposition in a habeas corpus action until the petitioner's claim is arguably moot, then rely on the asserted mootness resulting from their delay to deny relief.

Petitioner's first point raises an issue whether the court below "has so far departed departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." U.S.S.Ct.R. 10(a). The district court allowed the respondents to delay a response virtually until the eve of the petitioner's release on parole, then delayed the case itself for over a year. When the petitioner objected on appeal to the use of this delay as the basis for a finding of mootness, the court of appeals refused to address the issue. That is not the accepted and usual course of judicial proceedings.

By granting leave to proceed in forma pauperis and by granting a certificate of probable cause, respectively, the district court and the court of appeals have recognized that the petitioner has presented one or more non-frivolous claims of Fourteenth Amendment due process violations concerning his parole revocation. No federal court has addressed the merits of his grievances. Neither the district court nor the court below

addressed the merits of his grievances because it allowed the respondents to delay their answer until a month before the petitioner was due for release for good behavior. App. 38 & n.1; App. 9.

In moving for enlargements of time adding up to five (5) weeks, the respondents' counsel cited no particular facts justifying the delay. Both of the respondents' counsel in the district court used substantially the same conclusory boilerplate that did not allow the district court to confirm their excuses by reference to cases before it and other courts. Respondents gave no reason for reassigning the case from one attorney to another. App. 24 & 30. Although the applicable rules of civil procedure allowed the petitioner fifteen (15) days in which to respond to the motions, the district court waited not for an answer. App. 27 & 37.

The court below has held that a Missouri pro se prisoner is chargeable with knowledge of the contents of his or her Adult Institutions Face Sheet, whether or not the prisoner has received it; that court enforced a procedural default based on a prisoner's failure to act on information on his face sheet. Griffini v. Mitchell, 31 F.3d 690 (8th Cir. 1994). With the vast resources of the State at their beck and call, the respondents' counsel should be held to no less exacting a standard. Applying the principle of Griffini to both sides in habeas corpus litigation, counsel knew or should have known from the time they appeared in the action (June 1, 1993) that the petitioner's

sentence would expire on October 16, 1993. App. 56-57. Because Griffini attributes knowledge of the contents of a face sheet to a pro se party, moreover, the respondents were in fact chargeable with knowledge of the petitioner's impending release date from the time he filed his federal action. The district court's handling of this claim allows the respondents to be judges in their own case. Dr. Bonham's Case, 8 Co. Rep. 114a (C.P. 1610). See also Tumey v. Ohio, 273 U.S. 510 (1927).

Recently the political branches have sought to limit the occasions in which a prisoner may seek relief in federal habeas corpus. Pub. L. 104-132, 110 Stat. 1218 (approved April 24, 1996). Even in the recently-limited statutes, no provision suggests that a respondent may delay a response until the eve of a prisoner's release, then rely on mootness as a defense to a non-frivolous federal constitutional grievance; *that* would have been too strong even for the political branches. In light of the facts of this case, it is ironic that the impetus for the habeas corpus limitation portions of the Antiterrorism and Effective Death Penalty Act of 1996 was the concern of respondents that prisoners were avoiding the just disposition of their cases by dilatory tactics. Here the respondents have done just the same thing when it has suited their purpose, and the lower courts have allowed them to get away with it. The court below excused a Missouri prisoner from exhausting state remedies when the state courts handled his case with this effect. Chitwood v. Dowd, 889 F.2d 781, 784-85 (8th Cir. 1989). It fails to explain why the

result should be different when the delay occurs on a federal court's watch."

The court below noted that the petitioner is now facing the prospect that the Board's finding--on the basis of triple hearsay about what a declarant experienced while under the influence of crack cocaine--that the petitioner committed two (2) extremely serious crimes of violence is somehow attributable to the petitioner because he was once again convicted of a crime. App. 6. Carried to its logical extreme, this barb would eliminate collateral consequences in future parole consideration as a basis for deciding a claim filed when the petitioner was in custody if the case is delayed past his or her release. One could *always* blame the citizen whose rights the government has violated for the fact that he or she is once more before a parole board or a sentencing court.

That is not how the Constitution works. If the courts are only willing to apply the Bill of Rights when it protects deacons wardens and den mothers, it will not long be a protection even for them. See R. Bolt, A Man for All Seasons, act I, p. 147 (Three Plays, Heinemann ed. 1967)(Anglo-American legal tradition would give the Devil the benefit of the law, for the protection of honest citizens). This Court has given effect to the Bill of Rights and the Civil War Amendments *primarily* in the cases of those--like Randy Spencer--who are in trouble with the law.

Randy Spencer has been convicted of several crimes against the State of Missouri, and Randy Spencer has suffered for them.

The legitimacy of his punishment is not before this Court. The question before this Court is whether the laws that apply to Randy Spencer also apply to the Attorney General of the State of Missouri and to its Department of Corrections.

II. The court below erred in holding--in conflict with the Second, Seventh, and Ninth Circuits--that a habeas corpus petition challenging a parole revocation is "moot," when the petitioner was undisputedly in custody under color of the revocation when he filed the petition.

Respondents' and the district court's knowing delay--as documented in the statement of the case and appendix, and as discussed in the petitioner's first point--is sufficient to distinguish this case from Lane. In this respect the court below has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. U.S.S.Ct.R. 10(a).

In addition, the court below has entered a decision in conflict with the decision of another United States court of appeals on the same important matter, U.S.S.Ct.R. 10(a), in that it appears from the face of the opinion in question that the Eighth Circuit's disposition of this question is in conflict with that of the Second and Ninth Circuits. App. 4-5. It acknowledges that United States v. Parker, 952 F.2d 31, 33 (2d Cir. 1991), and Robbins v. Christianson, 904 F.2d 492, 495-96 (9th Cir. 1990), would allow a finding of collateral consequences such as the one in this case to overcome an objection of mootness. In the one (albeit unpublished) opinion that has so far cited the opinion of the court below, the Tenth Circuit notes the conflict. Lane v. Kindt, 97 F.3d 1464 (Table), 1996 WL

532119, **1 (10th Cir. Sept. 19, 1996). This Court should resolve the conflict.

It is disingenuous to suggest that the Board of Probation and Parole will not take into account its own finding that the petitioner was, in effect, guilty of "class A" forcible rape and armed criminal action. Consider the petitioner's parole officer's reference to a prior conviction and sentence in his initial violation report. App. 62. A parole revocation for forcible rape and armed criminal action is simply not a speculative factor.

Although the facts in this case are egregious, the petitioner's situation is far from unique. The practical effect of letting the lower court's decision stand would be that respondents and district courts could avoid decisions enforcing federal constitutional rights of probationers and parolees by running down the clock until their claims become "moot."

Jurisdictions including the United States are steadily requiring prisoners to serve greater proportions of the time to which trial courts sentence them. As the length of time prisoners are on parole decreases, the temptation to run down the clock on meritorious constitutional challenges to parole revocations increases. This combination of factors creates a perverse incentive to play fast and loose with parolees whom a crackhead or an enemy turns in for a parole violation.

Allowing official conduct of the type the court below *did not even choose to address* would send a message that if a proba-

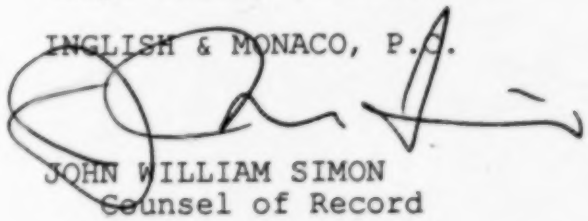
tioner or parolee is within two and a half (2½) years of his or her maximum release date, then Morrissey and Gagnon are dead letters, and the probationer or parolee has no rights the government is bound to respect.

Conclusion

WHEREFORE, the petitioner prays the Court for its order granting the pending petition for a writ of certiorari and reversing the judgment of the court below.

Respectfully submitted,

INGLISH & MONACO, P.C.



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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

96-7171 (3)

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On Petition for Writ of Certiorari to the
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APPENDIX TO
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113 pp

INDEX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 95-3629

Randy G. Spencer, Appellant, v. Mike Kemna; Missouri Attorney General, Appellees.	* * * * * * * * * *	Appeal from the United States District Court for the Western District of Missouri.

Submitted: May 17, 1996

Filed: August 2, 1996

Before BOWMAN, HEANEY, and WOLLMAN, Circuit Judges.

WOLLMAN, Circuit Judge.

Randy G. Spencer appeals the district court's[1] dismissal of his 28 U.S.C. § 2254 petition as moot. We affirm.

I.

Spencer was convicted in Missouri state court of felony stealing and burglary and was sentenced to concurrent terms of three years' imprisonment. He began serving his sentences on October 17, 1990, and was paroled on April 16, 1992. Spencer's parole was revoked on September 24, 1992, following a revocation hearing before the Missouri Board of Probation and Parole. The Board revoked Spencer's parole based on a violation report alleging that he had committed rape, used cocaine, and used a dangerous

[1]The Honorable Elmo B. Hunter, United States District Judge for the Western District of Missouri.

weapon.

Spencer filed this section 2254 petition on April 1, 1993, against Mike Kemna, Superintendent of the Western Missouri Correctional Center, and the Attorney General of Missouri (the State). The petition alleged that: (1) Spencer was denied the right to a preliminary hearing on his parole violations; (2) his conditional release date of October 16, 1992, was suspended without a hearing; (3) his parole revocation hearing violated his due process rights, in that he was denied counsel, he was not allowed to confront adverse witnesses, and the sole evidence against him was the violation report; and (4) he had to wait four months to receive a statement of the reasons why his parole was revoked.

The district court ordered the State to show cause by June 3, 1993, why Spencer's habeas relief should not be granted. The State requested and received two extensions of time until July 7 to file a response. Spencer objected to both motions for extensions of time, stating that the requests for extensions were designed to vex, harass, and infringe upon his substantive rights. The State filed a response to the show cause order on July 7, arguing that Spencer's claims were procedurally barred, or, alternatively, that the claims should be dismissed on their merits.

On July 14, Spencer filed a motion for final disposition of the matter, arguing that because he could be released as early as August 7, he would suffer irreparable harm if his petition was not decided before that date, in that his petition would become moot and he would have no other way to vindicate his rights. Spencer alleged that the State's motive in requesting extensions was to cause his petition to become moot. He also argued the merits of his petition.

Spencer was released on parole on August 7, 1993, and was discharged from parole upon completion of his sentences on October

16. On February 3, 1994, the district court noted Spencer's motion for final disposition and stated that "[t]he resolution of this case will not be delayed beyond the requirements of this Court's docket." On August 23, 1995, the district court dismissed the petition for habeas relief as moot because the sentences had expired.

Spencer argues on appeal that the district court erred in denying his petition as moot because the court's own delays caused the petition to become moot, he will suffer adverse future consequences due to the denial of the petition, and it is in the public interest to address the merits of his petition. Spencer notes that he is currently incarcerated on unrelated charges and that his prior parole revocation will affect his future chances of obtaining parole.

II.

An attack on a criminal conviction is not rendered moot by the fact that the underlying sentence has expired if substantial penalties remain after the satisfaction of the sentence. Carafas v. LaVallee, 391 U.S. 234, 237 (1968). Such penalties include the right to engage in certain businesses, to hold certain offices, to vote in state elections, or to serve as a juror. Id. The court will, in fact, presume that collateral consequences stem from a criminal conviction even after release. See Sibron v. New York, 392 U.S. 40, 57 (1968); Leonard v. Nix, 55 F.3d 370, 373 (8th Cir. 1995). The Supreme Court has held, however, that no similar penalties result from a finding that an individual has violated parole. Lane v. Williams, 455 U.S. 624, 632 (1982).

In Lane, two defendants pleaded guilty to state court prosecutions without being informed that their negotiated sentences included a mandatory parole term. Both were released on parole and reincarcerated for parole violations, and both filed habeas corpus

petitions requesting their release. Both had completed their parole terms by the time the court of appeals entered an order declaring the mandatory parole terms void. Id. at 265-30. The Supreme Court determined that the petitions were moot because the petitioners attacked only their sentences, which had expired; they did not attack, either on substantive or procedural grounds, the finding that they violated the terms of their parole. Id. at 631, 633.

The Court went on to find that, unlike a criminal conviction, no civil disabilities result from a parole violation finding. The Court stated that "[a]t most, certain nonstatutory consequences may occur." Id. at 632. The Court found that the collateral consequence arising from the possible effect of the parole revocation on future parole decisions was "insufficient to bring this case within the doctrine of Carafas." Id. at 632 n.13. Relying on the relevant Illinois law, the Court noted that the existence of a prior parole violation did not render an individual ineligible for parole, but was simply one factor among many considered by the parole board. Id. at 633 n.13.

We have dismissed a habeas corpus appeal challenging a parole revocation for lack of jurisdiction as moot when the movant was again paroled before the case was orally argued. Watts v. Petrovsky, 757 F.2d 964, 965-66 (8th Cir. 1985) (per curiam). We considered as too speculative to overcome mootness the argument that the movant's parole could once again be revoked and the prior parole revocation report used against him. Id. at 966.

Spencer first attempts to distinguish Lane on the ground that, unlike the petitioners in that case, he attacked not only his sentence, but also the underlying basis of his parole violations. This distinction has been used by courts of appeals in other circuits to overcome mootness in the parole revocation context. See United States v. Parker, 952 F.2d 31, 33 (2d Cir. 1991);

Robbins v. Christianson, 904 F.2d 492, 495-96 (9th Cir. 1990). It must be recognized, however, that the Court in Lane went on to hold that the possible collateral consequences in future parole hearings stemming from a finding of parole violation are insufficient to overcome mootness. Lane, 455 U.S. at 632-33 & n.13. This part of the Court's holding Spencer cannot overcome.

Spencer attempts to further distinguish Lane on the ground that it relies on Illinois, rather than Missouri, law. We find this purported distinction unpersuasive. The Illinois regulations relied upon in Lane explicitly provided that the parole board should consider an individual's prior parole violations as a factor in determining whether parole should be granted. Lane, 455 U.S. at 639 (Marshall, J., dissenting). Under Missouri statutes and regulations, the Board does not explicitly rely on a prior parole violation even as one factor in its decision regarding whether to grant parole.[2] Lane's holding, therefore, is even more applicable

[2]The Missouri statute concerning parole provides, in relevant part:

> When in its opinion there is reasonable probability that an offender of a correctional center can be released without detriment to the community or to himself, the board may in its discretion release or parole such person except as otherwise prohibited by law.

Mo. Rev. Stat. § 217.690.1 (1994).

In addition, the statute provides that "[t]he Board shall adopt rules . . . with respect to the eligibility of offenders for parole." Mo. Rev. Stat. § 217.690.3 (1994).

Pursuant to this section, the board has adopted regulations stating that the reasons for its decisions to deny parole include:

> 1. Release at this time would depreciate the seriousness of the offense committed or promote disrespect for the law;
> 2. There does not appear to be a reasonable probability at this time that the inmate would live and remain at liberty without violating the law;
> 3. The inmate has not substantially observed the rules

to a case arising under Missouri law.

Spencer finally attempts to distinguish his case from both Lane and Watts on the ground that the collateral consequences of his parole revocation are not speculative as to him, in that he is once again incarcerated and is facing new parole hearings. Although Spencer's possible collateral consequences are not as speculative as those in Watts, 757 F.2d at 966, we conclude that they remain too speculative to overcome a finding of mootness. Given the Board's wide discretion in releasing a prisoner on parole, we cannot say that the Board will rely on Spencer's previous parole violation in making its decision. Moreover, Spencer placed himself in his present position, in which collateral consequences stemming from his parole revocation become more likely. As noted of the petitioners in Lane, Spencer was "able--and indeed required by law--to prevent such a possibility from occurring." Lane, 455 U.S. at 633 n.13.

III.

Spencer argues that his action should not be dismissed as moot because the important public interest in due process in parole revocation proceedings excepts his case from the mootness doctrine. He argues that because of the important public interest, he need not show that he will be personally affected by the outcome.

To be excepted from the mootness doctrine, the matter must be

> of the institution in which confined; and
> 4. Release at this time is not in the best interest of society.

Mo. Code Regs. tit. 14, § 80-2.010(9)(A) (1992).

The regulations explicitly state that a parole violator "can be considered for parole at a later time." Mo. Code Regs. tit. 14, § 80-4.030(4) (1992).

"'capable of repetition, yet evading review,'" and there must be "'a reasonable expectation that the complaining party would be subjected to the same action again.'" Lane, 455 U.S. at 633-34 (quoted citations omitted); see also DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) (per curiam) (although state law may save case from mootness based on public interest, federal courts require litigants' rights be affected). Spencer must show a "reasonable likelihood" that he will be affected by the Board's allegedly unconstitutional parole revocation procedures in the future. See Honig v. Doe, 484 U.S. 305, 318 (1988). "[A] mere physical or theoretical possibility" is insufficient to satisfy the test. Murphy v. Hunt, 455 U.S. 478, 482 (1982).

We do not find a reasonable likelihood that Spencer will again be affected by the Board's parole revocation procedures. Assuming that Spencer is paroled from his present incarceration, we will not assume that he will violate his parole terms in order to again undergo revocation proceedings. See Honig, 484 U.S. at 320 (generally unwilling to assume party will repeat misconduct).

The order of dismissal is affirmed.

HEANEY, Circuit Judge, concurring.

I concur in the result reached by the majority only because I agree we are bound by the United States Supreme Court's decision in Lane v. Williams, 455 U.S. 624 (1982). Were I writing on a clean slate, I would reverse the district court because it seems clear that Spencer may suffer collateral consequences as a result of the revocation of his parole.

It is unfortunate that the decision on whether the revocation hearing comported with due process was delayed for so long that the matter became moot by Spencer's release from prison. If nothing else, this case highlights the necessity of making prompt decisions

in revocation cases.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY SPENCER, Petitioner,	)	
vs.	)	Case No. 93-0299-CV-W-3-P
MIKE KEMNA, Respondent.	)	

ORDER DISMISSING CASE

Petitioner brought this case under 28 U.S.C. § 2254 to challenge the revocation of his parole from concurrent sentences for burglary and stealing. The record shows that petitioner was released from incarceration approximately four months after filing this case, and that he completed service of his maximum term approximately two months later. See Doc. No. 13, p. 1, n.1 (State's response). Because the sentences at issue here have expired, petitioner is no longer "in custody" within the meaning of 28 U.S.C. § 2254(a), and his claim for habeas corpus relief is moot.

Accordingly, it is ORDERED that this case is dismissed for the reason stated herein.

ELMO B. HUNTER
SENIOR DISTRICT JUDGE

Kansas City, Missouri,
Dated: AUG 23 1995.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-3629WMKC

Randy G. Spencer, Appellant,	•	
vs.	•	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
Mike Kemna; Missouri Attorney General, Appellees.	•	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 19, 1996

Order Entered at the Direction of the Court:
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

TERMED APPEAL
PPROSE

U.S. District Court
Western District of Missouri (Kansas City)

CIVIL DOCKET FOR CASE #: 93-CV-299

Spencer v. Kemna, et al — Filed: 04/01/93
Assigned to: Judge Elmo B. Hunter
Referred to: Prisoner Pro Se
Demand: $0,000 — Nature of Suit: 530
Lead Docket: None — Jurisdiction: Federal Question
Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

RANDY G SPENCER
petitioner

Randy G Spencer
509407
[COR LD NTC] [PRO SE]
ACC
Algoa Correctional Center
P.O. Box 538
Jefferson City, MO 65102

v.

MIKE KEMNA
respondent

Ronald L. Jurgeson
[COR LD NTC]
Jackson County Courthouse
415 E. 12th St.
Ste. 200
Kansas City, MO 64106
(816) 881-3355

MO ATTY GENERAL
respondent

Ronald L. Jurgeson
(See above)
[COR LD NTC]

I HEREBY ATTEST AND CERTIFY ON OCT 13 1995
THAT THE FOREGOING DOCUMENT IS A FULL TRUE AND
CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE
AND IN MY LEGAL CUSTODY
R. F. CONNOR
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF MO.
BY Kelsie Pierce DEPUTY

4/1/93	1	PETITION FOR WRIT OF HABEAS CORPUS pursuant to 28 USC 2254 w/req to proceed ifp (PROV. filed pursuant to Court en banc Order of 12/3/68) Def's Order to pet. w/ ifp forms. NO INFO COPY. (ce) [Entry date 04/05/93]
4/1/93	--	Notice: Case referred to Pro Se office to Prisoner Pro Se (ce) [Entry date 04/05/93]
4/5/93	2	DEFECTS ORDER by Judge Elmo B. Hunter P 116 748 846 to Spencer (cc: all counsel) (ce)
4/8/93	3	AFFIDAVIT of Randy G. Spencer (ce) [Entry date 04/12/93]
4/12/93	4	Mail Returned addressed to Randy G Spencer P 116 748 846 Doc. 2, rec'd 3/6/93 (ce)
4/15/93	--	Receipt# 55333 $5.00 filing fee of Spencer. (ce) [Entry date 04/16/93]
5/3/93	5	ORDER TO SHOW CAUSE: by Judge Elmo B. Hunter ;ordered to show cause by 6/3/93 (cc: all counsel) (ce) [Entry date 05/05/93]
5/1/93	6	MOTION by petitioner Randy G Spencer to extend time to file response to Court's Order to Show Cause. (ce) [Entry date 06/02/93]
5/3/93	7	ORDER by Judge Elmo B. Hunter granting motion to extend time to file response to Court's Order to Show Causei to 6/23/93. [6-1] (cc: all counsel) (ce) [Entry date 06/04/93]
5/8/93	8	Objections by petitioner Randy G Spencer to resp. mtn ext. (ce) [Entry date 06/09/93]
6/23/93	9	MOTION by respondent to extend time to answer (ce) [Entry date 06/24/93]
5/23/93	10	ATTORNEY APPEARANCE for respondent : Ronald L. Jurgeson (ce) [Entry date 06/24/93]
5/30/93	11	Suggestions by petitioner Randy G Spencer in opposition to motion to extend time to answer [9-1] (ce) [Entry date 07/01/93]
5/30/93	12	ORDER by Judge Elmo B. Hunter granting motion to extend time to answer [9-1] 7/7/93 for MO Atty General, for Mike Kemna (cc: all counsel) (ce) [Entry date 07/06/93]
7/7/93	13	Response by respondent to Order to show cause why a writ of habeas corpus should not be granted. (ce) [Entry date 07/09/93]

INTERNAL USE ONLY: Proceedings include all events. TERMED APPEAL
4:93cv299 Spencer v. Kemna, et al PPROSE

7/13/93	14	ORDER by Judge Elmo B. Hunter That resp. is granted to 7/7/93 to file response to pet's pet. as by the order to show cause. (cc: all counsel) (ce) [Entry date 07/16/93]
7/14/93	15	MOTION by petitioner Randy G Spencer for final disposition of this matter (ce) [Entry date 07/16/93]
7/15/93	16	ORDER by Judge Elmo B. Hunter (1) pet. file a reply to resp's answer, filed 7/7/93, w/n 30 days from the date of this Order; (2) pet's failure to do so will result in dismissal of this case w/o further notice; and (3) the Clerk send pet. a copy of this Order by reg. and cert. mail, rrr. P 246 793 461 to Spencer. (cc: all counsel) (ce) [Entry date 07/20/93]
7/26/93	17	Supplemental by petitioner Randy G Spencer re motion for final disposition of this matter [15-1] (pt)
7/27/93	18	Mail Returned of green cert mail card P # 246 793 461, order of 7/15/93 addressed to Randy G Spencer, signed by J Bawman on 7/21/93 (pt) [Edit date 07/27/93]
8/13/93	19	NOTICE by petitioner Randy G Spencer of change of address to c/o Robert & Linda Smothers, Lot A-15, Terra Linda Trailor Park, Warrensburg, Mo. 64093 (ce) [Entry date 08/27/93]
2/3/94	20	ORDER by Judge Elmo B. Hunter taking under advisement on the motion for final disposition of this matter [15-1] (cc: all counsel) (ce) [Entry date 02/04/94]
3/23/95	21	ORDER by Judge Elmo B. Hunter That this case is dismissed. terminating case (cc: all counsel) (ce)
3/23/95	22	CLERK'S JUDGMENT Case dismissed for the reasons stated. Entered on: 8/23/95 (cc:All Counsel) (ce)
8/25/95	--	MAIL RETURNED: judgment [22-1], order [21-2] returned as undeliverable to Randy G Spencer for petitioner Randy G Spencer (ce)
9/5/95	23	NOTICE OF APPEAL by petitioner Randy G Spencer from Dist. Court decision [22-1] Filed 8/23/95 Entered 8/23/95 Paid $ 0 Rct. # 0 (dw)
10/5/95	24	ORDER by Judge Elmo B. Hunter That pet's mtns for leave to proceed on appeal ifp and for a cert. of probable cause are denied. (cc: all counsel) (ce) [Entry date 10/11/95]

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

93-0299-CV-W-3

PERSONS IN STATE CUSTODY APPLICATION FOR
HABEAS CORPUS UNDER 28 U.S.C. SECTION 2254

Name: Randy G. Spencer

Prison Number: #176948

Place of Confinement: W.E.C.C., R.R. 5., Box 1-E, Cameron, Mo.64429

United States District Court Western District of Missouri

Case No: _____ (to be supplied by Clerk of the U. S. District Court)

Randy G. Spencer PETITIONER
(Your Full Name)

v.

Mike Kemna, Supt., W.M.C.C. RESPONDENT

(Name of Warden, Superintendent, Jailer, or authorized person having custody of petitioner.)

and

THE ATTORNEY GENERAL OF THE STATE OF Missouri
ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the future, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the future under a federal judgment which he wishes to attack, petitioner should file a motion under 28 U.S.C. Section 2255, in the federal court which entered the judgment.)

Instructions - Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as a basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the facts which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee you may request permission to proceed in forma pauperis, in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is Office of the Clerk

United States District Court, 811 Grand Ave, Kansas City Mo.

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Missouri Dept. of Prob. & Parole, Jefferson City, Missouri
2. Date of judgment of conviction: September 24, 1992, parole revoked
3. Length of sentence: the remainder of my current sentence
4. Nature of offense involved (all counts): Violation of State Laws, Use of Drugs and Posession of a deadly weapon
5. What was your plea? (Check one)
   (a) Not Guilty XXXX
   (b) Guilty ____
   (c) Nolo Contendere ____

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

6. Kind of trial: (Check One) (a) Jury ____ (b) Judge only Parole Bd.
7. Did you testify at the trial? Yes [X] No [ ]
8. Did you appeal from the judgment of conviction? Yes [X] No [ ]
9. If you did appeal, answer the following:
   (a) Name of court: Circuit Court of Dekalb Co., Mo.
   (b) Result: Petition for Writ of Habeas Corpus denied
   (c) Date of result: January 28, 1993
10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, Rule 27.26 motions or other motions with respect to this judgment in any court, state or federal?

Yes [X] No [ ]

11. If your answer to 10 was "yes," give the following information:

(a) (1) Name of court: Mo. Court of Appeals, K.C.,Mo.

(2) Nature of proceeding: Writ of Review; request for Writ of Certuerior #47416

(3) Grounds raised: Denied Preliminary Hearing on all alleged parole violations. Mo. mendate Conditional Release Date was taken from me without a hearing. Denied right to a representive of my choice at my revocation hearing. to confront-cross examine witness

(4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes [ ] No [X]

(5) Result:

(6) Date of result:

(b) As to any second petition, application or motion give the same information:

(1) Name of court: CONTINUED FROM ABOVE #11

(2) Nature of proceeding:

(3) Grounds raised: was not told by parole board ~~KM~~ at my revocation hearing why there where no live witnesse: no evidence other then the parole violation report, that I denied all alligations of parole violation, that I was revoked at an unfair and bias parole hearin

(4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes [ ] No [X]

(5) Result: Writ of Review; request for Certuerior

(6) Date of result: denied on Febuary 17, 1993

(c) As to any third petition, application or motion, give the same information:

(1) Name of court: Missouri Supreme Court

(2) Nature of proceeding: Petition For Writ of Habeas Corpus case no. 75570

(3) Grounds raised: same as above except that I included that I was denied my right to an statement and the facts relied upon by the parole board, as to why my parole was revoked.

(4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes [ ] No [X]

(5) Result: petition for Writ of Habeas Corpus,

(6) Date of result: denied on March 23, 1993

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes [X] No [ ]

(2) Second petition, etc. Yes [X] No [ ]

(3) Third petition, etc. Yes [X] No [ ]

(e) If you did not appeal from the adverse action on any petition, application or motion, explain why you did not:

12. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search or seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Denied my right to a preliminary hearing on all alleged parole violations

Supporting FACTS (tell your story briefly without citing cases or law):

When I was originally violated, my parole officer violated my parole on (2) counts and a waived a hearing on these alleged violations.however, after I was in the Co.Jail a couple of weeks, my parole officer brought me a copy of the violation report and it had a third alleged parole violation on it and I did not sign a waiver on the third

B. Ground two: My Prison Conditional Release Date of Oct. 16, 1992 was taken from me without a hearing

Supporting FACTS (tell your story briefly without citing cases or law):

Under Mo. Law I was to have a conditional release date of October 16, 1992 and although Mo. Law requires a hearing to be conducted before my C.R. date could be taken from from me, when I was returned to the Mo. Dept. of Corr. at C.R.D.C., I was labeled a Parole Violator and as a policy and practice, my C.R. date was taken automatically and without a hearing before I was revoked by the parole boar

C. Ground three: My entire parole revocation hearing was Constitutionally Flawed and in violation of my due process rig

Supporting FACTS (tell your story briefly without citing cases or law):

I was denied my right to a representative of my choice at my revocation hearing, counsel, to cross examine and to confront any adverse witnesses, I was not told at the hearing why there where no live witnesses, there was no evidence at my hearing but the violation report (hearsey), that I was found guilty of Parole Violation based soley on violation repo

D. Ground four: That I was denied my right to a statement of the facts and the evidence relied on for parole revocation

Supporting FACTS (tell your story briefly without citing cases or law):

That I seen the parole board on September 23, 1992 and the policies of the Mo. Dept. of Probation and Parole states that I would be supplied with an answer withen (20) days, however, I had to wait four months and then to get an answer on why my parole was violated, I had to file an inmate grievance and then I find out that the parole board violated my parole, base soley on the violation report.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

I have not brung this up as I couldnt until now, but the courts that I have been through have not allowed me to rebute or to otherwise answer the respondents answers to my petitions, I file them and then they are denied.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes [ ] No [X]

15. Give the name and address, if known, of each attorney who represented you in the following states of the judgment attacked herein:

(a) At preliminary hearing No attorney has been appointed or represented me through my entir legal process, on parole violation

(b) At arraignment and plea

(c) At trial _____

(d) At sentencing _____

(e) On appeal _____

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding.

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes [ ] No [ ] three alleged parole violations

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes [ ] No [ ]

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) And give date and length of sentence to be served in the future:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes [ ] No [ ]

Wherefore, petitioner prays that the Court grant petitioner relief to which petitioner may be entitled in this proceeding.

myself Randy G. Spencer
Signature of attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on March 26 1993
(date)

Randy G. Spencer
Signature of petitioner

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER,

Petitioner,

vs.

MIKE KEMNA,

Respondent.

Case No. 93-0299-CV-W-3-P

ORDER DIRECTING RESPONDENT TO FILE AN ANSWER

Petitioner, who is incarcerated at the Western Missouri Correctional Center in Cameron, Missouri, has filed pro se this petition for a writ of habeas corpus under 28 U.S.C. § 2254. He has paid the $5.00 filing fee required by 28 U.S.C. § 1914(a).

Petitioner challenges the revocation of his parole. He lists the following grounds for relief: (1) he was denied the right to a preliminary hearing concerning alleged parole violations; (2) his conditional release date was suspended without a hearing; (3) his parole revocation hearing was constitutionally flawed and did not comport with the principles of due process; and (4) he was denied the opportunity to review the evidence relied on in revoking his parole.

Granting petitioner's claims a liberal construction, see Haines v. Kerner, 404 U.S. 519 (1972), they do not appear to be frivolous or malicious.

Accordingly it is ORDERED that respondent answer the petition

within thirty (30) days from the date of this Order, and show cause why the relief sought should not be granted.

ELMO B. HUNTER
UNITED STATES DISTRICT COURT

Kansas City, Missouri
Dated: 5-3-'93.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER,
Petitioner,
v.
MIKE KEMNA,
Respondent.

No. 93-0299-CV-W-3-P

MOTION FOR EXTENSION OF TIME

Comes now respondent, by and through counsel, and states as follows in support of his motion for an extension of time in which to file his respon.. to this court's order to show cause why a writ of habeas corpus should not be granted.

1. That respondent's response in the above-styled cause is due on or before June 2, 1993.

2. That counsel has, within the past weeks, filed numerous responses in federal habeas corpus cases, written and filed numerous briefs, and prepared for and made several oral arguments in the various courts in the State of Missouri. Due to this litigation, respondent has been delayed in the completion of his brief in the above-styled cause.

3. That the request for an extension is not designed to vex, harass or infringe in any way upon the substantive rights of appellant.

WHEREFORE, for the reasons herein stated, respondent prays this court grant his motion for an extension of time for twenty-one (21) days, up to and including June 23, 1993.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

FRANK A. JUNG
Assistant Attorney General

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this ___ day of May, 1993, to:

Randy G. Spencer
Reg.No. 176948
W.M.C.C.
Route 5, Box 1-E
Cameron, MO 64429

FRANK A. JUNG

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER, Petitioner,	)	
v.	)	No. 93-0299-CV-W-3-P
MIKE KEMNA, Respondent.	)	

ORDER

Upon motion of respondent, and for good cause shown, it is ORDERED that respondent is granted an extension of time of twenty-one (21) days, up to and including June 23, 1993, to respond to this Court's Order to show cause.

UNITED STATES DISTRICT JUDGE

Dated: _____

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER,)
)
Petitioner,)
)
v.) No. 93-0299-CV-W-3
)
MIKE KEMNA,)
)
Respondent.)

FILED
JUN 03 1993
R. F. O'CONNOR, CLK.
U. S. DISTRICT COURT
WEST DISTRICT
OF MISSOURI

ORDER

Upon motion of respondent, and for good cause shown, it is ORDERED that respondent is granted an extension of time of twenty-one (21) days, up to and including June 23, 1993, to respond to this Court's Order to show cause.

Elmo B. Hunter
UNITED STATES DISTRICT JUDGE

Dated: 6-3-93

27

Document #_____

ORIGINAL

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

FILED
JUN 8 1993

RANDY G. SPENCER,
Petitioner,

-vs-

MIKE KEMNA,
Respondent.

Case No. 93-0299-CV-W-3-2

Pets objections to respondents motion for extension of time
~~PETITIONER'S OBJECTION~~

Comes now, the petitioner, Randy G. Spencer, a pro-se litigant, and in objection too the respondents request for an extension of time, this petitioner will state as follows:

1. That the respondents motion for an extension of time, in the above entitled cause of action, is a sham plea motion and should be denied.

2. In fact, the respondents very first statement, in paragraph #1, is false information to this court, as the respondents response to this courts show cause order, is not due on or before June 2, 1993 as the respondent has stated, but rather, the respondents response to this courts show cause order is not due until June 13, 1993, a difference of eleven days from the time date that the respondent has based his request for an extension of time on, however, when this court considers the respondents request for an extension of time, the "Timeliness of motions must be determined by tables in effect when motion was filed". See, Miley v Sharp, 782 F.2d 1366, cereal after remand, 811 F.2d 500 (Inf. 1986).

3. The fact is, this court ordered the respondent to respond to this courts show cause order, within (30) days of the date of said order, date being May 13, 1993, however, the respondents attorney has waited (20) days of this (30) day time limit, before requesting an extension of time and even then, it appears that he only done it because he thought he was out of time.

4. Another fact is, the respondents attorney should have been more responsible and diligent in the respondents re-

Document #_____ 28

dents attorney has presented (2) two, seperate and distinct, lies and falsities to this court, and that any further pleadings from the respondent and/or his attorney, should be viewed with great care and skeptism, esspicailly when this court has to adjucate this petitioners constitutionally flawed parole revocation hearing and this petitioners illegal incarceration, which is being justified by the respondent and his attorney.

THEREFORE, this petitioner prays that this honorable court will deny the respondents motion and request for an extension of time, and, that the respondent will be ordered to respond to this courts show cause order, by the deadline date of said order.

RESPECTFULLY SUBMITTED BY,

Randy G. Spencer #175948
W.M.C.C./ R.R. 5. Box 1-E
Cameron, Missouri-64429

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, by U.S. Mail, postage pre-paid, this 14th day of June, 1993, to:

Frank A. Jung
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri
65102

Randy G. Spencer #175948

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER, Petitioner,	)	
vs.	)	No. 93-0299-CV-W-3-P
MIKE KEMNA, Respondent.	)	

RESPONDENT'S MOTION FOR ENLARGEMENT OF TIME IN WHICH TO FILE RESPONSE

COMES NOW respondent, by and through counsel, Jeremiah W. "Jay" Nixon, Attorney General of the State of Missouri, and Ronald L. Jurgeson, Assistant Attorney General, and states as follows in support of his motion for extension of time in which to respond:

1. That respondent's response in the above-styled cause is currently due on or before June 23, 1993;

2. That counsel has, within the past weeks, filed numerous responses in federal habeas corpus cases, and has written and filed numerous briefs in the Eighth Circuit Court of Appeals and has prepared for and made several oral arguments in the Eighth Circuit. Due to this litigation, respondent has been unable to complete the response in the above-styled case;

3. That this requested extension in not designed to vex or harass petitioner. Petitioner's substantive rights should not be adversely affected.

WHEREFORE, for the reasons stated above, respondent requests an extension of time of fourteen (14) days, up to and including July 7, 1993, in which to respond in the above-styled cause.

Respectfully Submitted,

JEREMIAH W. "JAY" NIXON
Attorney General

RONALD L. JURGESON
Assistant Attorney General
Missouri Bar No. 35431

Penntower Office Center
3100 Broadway, Suite 609
Kansas City, Missouri 64111
(816) 889-5000
(816) 889-5006 FAX

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 23rd day of June, 1993, to:

Randy G. Spencer
Reg. No. 176948
Western Missouri Correctional Center
Route 5, Box 1-E
Cameron, Missouri 64429

RONALD L. JURGESON
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER,
Petitioner,
vs.
MIKE KEMNA,
Respondent.

No. 93-0299-CV-W-3-P

ENTRY OF APPEARANCE

COMES NOW Ronald L. Jurgeson, Assistant Missouri Attorney General, and enters his appearance on behalf of respondent.

Respectfully Submitted,

JEREMIAH W. "JAY" NIXON
Attorney General

RONALD L. JURGESON
Assistant Attorney General
Missouri Bar No. 35431

Penntower Office Center
3100 Broadway, Suite 609
Kansas City, Missouri 64111
(816) 889-5000
(816) 889-5006 FAX

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 23rd day of June, 1993, to:

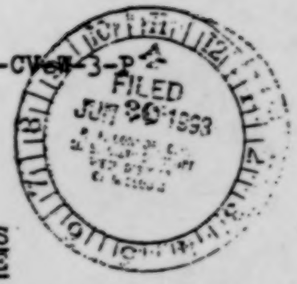
Randy G. Spencer
Reg. No. 176948
Western Missouri Correctional Center
Route 5, Box 1-E
Cameron, Missouri 64429

RONALD L. JURGESON
Assistant Attorney General

IN THE ITED STATES DISTRICT COURT OR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER,
Petitioner,
vs.
MIKE KEMNA,
Respondent.

Case No. 93-0299-CV-W-3-P



PETITIONERS' OBJECTION TO THE RESPONDENTS "SECOND REQUEST" FOR AN EXTENSION OF TIME

Comes now, the petitioner, Randy G. Spencer, pro-se, and in objection to the respondents' second request for an extension of time, this petitioner will state as follows:

1. That on June 2, 1993, a Mr. Frank A. Jung, entered into these pleadings as the respondents attorney.

2. That when Mr. Jung had entered into these proceedings, as the respondents attorney, Mr. Jung had requested an extension of time, up to and including June 23, 1993, a period of (3) weeks, in which to make and file a response for the respondent, to this courts show cause order of May 13, 1993, and, Mr. Jung had made his request for an extension of time, on what he thought was the last possible day in which to do so; June 2, 1993, however, and in reality, Mr. Jung still had eleven (11) days of the original show cause order time, to make and file a respons to this courts show cause order and that such a response was not due until June 13, 1993.

3. That when a court considers a motion for an extension of time, it has wide discreation to grant or to deny such a motion, F.R.C.P., rule 6(b), however, requests are usually granted on a showing of good cause, Creedon v Taubman, 8 F.R.D. 268 (D,C.Ohio 1947); and presuambly with the understanding, that the time that is to be granted, will be time spent on purposes for which the time was requested.

4. That on June 23, 1993, the day in which Mr. Jung was to have filed a response to this courts show cause order, for the respondent, instead of a response to this courts show cause order being filed, a Mr. Ronald L. Jergeson enters into these pleadings,

case, nor is this court granted such motion, releaving Mr. Jung of his responsibilities, to the respondent or this court.

H. That without being relieved of their responsibilities, and, without filing a response to this courts show cause order of May 13, 1993, on June 23, 1993, Mr. Jung and the respondent have violated this courts order of June 3, 1993.

6. That on June 23, 1993, when Mr, Ronald L. Jergeson made his appearence, for the respondent and as his attorney, that such an appearence should not and does not satisfy this courts order of June 3, 1993, that a response to this courts show cause order, was due on June 23, 1993, not an entry of appearence, by an attorney.

7. That when Ronald L. Jergeson had made his appearence, and, instead of requesting an extension of time, because this petitioners case had just been transferred to him, and that he was unprepaired and unable to file a response to this courts show cause order, or that a response was forthcoming and that an extension of time was needed to finish the response up, from the documents and materials that Mr. Jung had sent him; Mr. Ronald L. Jergeson requested an extension of time, based on the exact same set of reasons and excuses, that Mr. Jung had used.

8. That it appears that Mr. Jergeson has assertained, that sence the reasons and excuses that Mr. Jung had used, had worked, that he too would use them.

9. That a question of "truthfullness" must be drawn, when Mr. Jergeson had used the exact same set of reasons and excuses, that Mr. Jung had used, in making his request for an extension of time, as a request for an extension of time cannot show good cause, if it is based on lies, or uniform application.

10. Further, both of the attornies in this case, for the respondent, have claimed that their motions for an extension of time, where not designed to vex, harass, or to infring on this petitioners substantive rights, and, they further state that such a request for an extension of time, is necessary, because of "other litigation" which has caused them to be unable or delayed to file a response to this courts show cause order.

11. That if the respondents requests for an extension of time,

where not designed to vex the litigation of this case, and this petitioners substantive rights, then why have both of the attornies in this case, for the respondent, waited until the day in which the response to the show cause order was due, and then make their appearence and request for an extension of time.

12. The attorneies for the respondent, are not stupid, and they could have or would have known ahead of time, that "other litigation", could possibly cause them to be delayed in their response to this courts show cause order, for the respondent, but instead of the respondents attornies forseeing any possibly delays, or making their appearance at the earliest possible moment, and making their request for an extension of time, then, they both waited until the day in which the response to this courts show cause order was due, befor making their appearence and requesting an extension of time, denying this petitioner, the opportunity and ability to file a motion of objection to their requests for extensions of time, until after this court has granted their requests.

13. That the respondents requests for an extension of time, are designed to VEX, harass, and to infringe on this petitioners substantive rights.

THEREFORE, this petitioner prays that this court will deny the respondents "second request" for an extension of time, and to require that Mr. Frank A. Jung, make and file a response to this courts show cause order, like he was granted time in which to do so, that this court put a stop th the vexation of this case, by the respondents attornies, and that if this courts grants the respondents "second request" for an extension of time, that this court make sure that it is the last extension of time, at this point in these proceedings, and, for this court to take what ever other actions, that it deems just and fair.

Respectfully Submitted by,

Randy A. Spencer

RANDY A. SPENCER/ Petitioner

CERTIFICATE OF SERVICE

I hereby certify, that a copy of the foregoing has been mailed, postage pre-paid, on this 25th day of June, 1993, to:

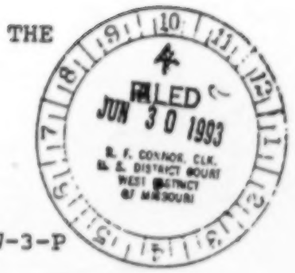
CONTINUED ON

Ronald L. Jergel, Pentower Office Building 3100 Broadway, Suite 609, Kansas City, Missouri-64111- attorney for the respondent.

Randy A. Spencer

RANDY A. SPENCER/ Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION



RANDY G. SPENCER,)
Petitioner,)
vs.) No. 93-0299-CV-W-3-P
MIKE KEMNA,)
Respondent.)

ORDER

Upon motion of respondent, and for good cause shown, it is ORDERED that respondent is granted an enlargement of time up to and including July 7, 1993, in which to file a response to the petitioner's petition as directed by this Court's order to show cause.

IT IS SO ORDERED.

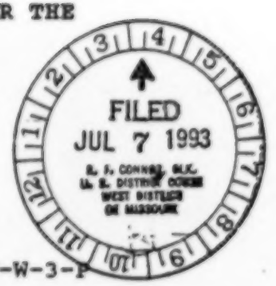
ELMO B. HUNTER
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri,
Dated: 6-30-93.

ORIGINAL

Document # 12

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION



RANDY SPENCER,)
Petitioner,)
vs.) No. 93-0299-CV-W-3-P
MIKE KEMNA,)
Respondent.)

RESPONSE TO ORDER TO SHOW CAUSE WHY A WRIT OF HABEAS CORPUS SHOULD NOT BE GRANTED

COMES NOW respondent, by and through counsel, and states as follows in response to this Court's order to show cause why a writ of habeas corpus should not be granted.

STATEMENT OF CUSTODY AND PARTIES

Named petitioner, Randy Spencer, is presently incarcerated at the Western Missouri Correctional Center located in Cameron, Missouri, pursuant to the judgment and sentence of the Circuit Court of Jackson County, Missouri. Petitioner was convicted, after a plea of guilty, of burglary in the second degree and stealing over $150. Petitioner received concurrent terms of three years imprisonment upon his convictions. Petitioner has yet to complete serving his present terms of imprisonment.[1]

Mike Kemna, Superintendent of the Western Missouri

[1]Records from the Missouri Division of Probation and Parole indicate that petitioner has been scheduled for parole release on August 7, 1993. This presumptive release date is, of course, based upon continued acceptable behavior in the Missouri Department of Corrections until that time. The exhibits also indicate that petitioner will complete the service of his entire term of imprisonment on October 16, 1993 (Resp.Exh.A, p. 1).

Document # 13

Correctional Center, is petitioner's custodian and is a proper party respondent. 28 U.S.C. §2254, Rule 2(a).

STATEMENT OF EXHIBITS

1. Attached hereto are true and correct copies of documents relating to petitioner's parole and subsequent parole revocation regarding his Jackson County charges; said documents are incorporated by reference herein, and identified as Respondent's Exhibit A.

STATEMENT OF ISSUES AND EXHAUSTION

In the present petition, petitioner has presented what he characterizes as four allegations for review by this Court. Paraphrased from petitioner's petition and this Court's order of May 3, 1993, those four allegations are as follows:

(1) That petitioner was denied the right to a preliminary hearing concerning his parole violation;

(2) That petitioner's conditional release date was suspended without a hearing;

(3) That petitioner's parole revocation hearing was constitutionally flawed and did not comport with the principles of due process; and

(4) That petitioner was denied the opportunity to review the evidence relied on in revoking his parole.

(Pet. at pp. 6-7).

Examination of the petition together with the above-listed exhibits indicates that petitioner, for the purpose of 28 U.S.C. Section 2254, has exhausted his claims because he has either fairly presented the claims to the Missouri state courts or because he is

respondent be allowed an opportunity to discuss the exhaustion or non-exhaustion of those claims.

STATEMENT AS TO MERITS

I.

In his first allegation, petitioner asserts that he was denied his right to a preliminary hearing at the time he was notified of his parole violations (Pet. at p. 6). Petitioner asserts that at the time he was arrested as a parole violator he was informed of two counts forming the basis of the violation warrant (Pet. at p. 6). Petitioner admits that with respect to at least two of the bases for the arrest warrant, he waived a preliminary hearing (Pet. at p. 6). It is only with a third basis for the arrest that petitioner now takes exception. Petitioner asserts that he had not waived a preliminary hearing with respect to the third cause for arrest.

To be sure, the United States Supreme Court has noted the importance of a preliminary hearing at the time of arrest with respect to parole violators. **Morrissey v. Brewer**, 408 U.S. 471, 484-487, 92 S.Ct. 2593, 2602-2603, 33 L.Ed.2d 484 (1972). In **Morrissey**, the Supreme Court noted that "due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available." **Id.**, at 485, 92 S.Ct. at 2602. With respect to the preliminary hearing, the Court stated the purpose as determining "whether there is probable cause or reasonable ground

to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." Id.

Here, petitioner's own statement in the petition before this Court would be sufficient to indicate that the purpose of the preliminary hearing was satisfied through acts of petitioner himself. Petitioner's admission as to two bases for the arrest certainly constitutes probable cause for a more detailed parole revocation proceeding. Accordingly, even if petitioner disagreed with the third and final foundation for his arrest, probable cause still existed through acts admitted to by petitioner. On this basis, petitioner's Ground I should be denied.

Additionally, the record developed during petitioner's parole revocation process indicates that petitioner waived a preliminary hearing (Resp.Exh.A, pp. 9, 17). Petitioner has offered no specific evidence to demonstrate that the preliminary hearing was not waived at the time of the arrest and preparation of the original violation report. As petitioner bears the burden of proof in a federal habeas corpus action, his claim under Ground I must be denied.

II.

Next, as his second allegaiton, petitioner asserts that he has somehow been deprived of a constitutional protection because his conditional release date was taken from him without a hearing (Pet. at p. 6). In the supporting facts relating to this ground, petitioner asserts that he had originally received a conditional release date of October 16, 1992 (Pet. at p. 6). Petitioner then

asserts that Missouri law requires a hearing prior to the extension of a conditional release date (Pet. at p. 6). Petitioner's allegation should be denied for the reasons in petitioner's petition itself.

The issue presented by petitioner in Ground II is only an issue of state law best left for determination by the state courts. Estelle v. McGuire, ___ U.S. ___, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

In this case, petitioner received a maximum sentence date of October 16, 1993 (Resp.Exh.A, pp. 1, 4, 6, 9, 11). Petitioner's maximum sentence date has remained unaffected by his parole violation (Resp.Exh.A, pp. 4, 6). As there is no constitutional right to conditional release and as petitioner has not had his maximum sentence date extended based upon his parole violation, there is no basis for Ground II. This ground should be denied.

III-IV.

As his remaining two allegations, petitioner argues that he has been deprived of various rights -- including the right to due process -- during his parole revocation hearing before the Missouri Board of Probation and Parole (Pet. at p. 7). Again, much like petitioner's Ground I, the assertions presented to this Court in Grounds III and IV find their constitutional foundation in the Supreme Court case of Morrissey v. Brewer, supra. In Morrissey, the United States Supreme Court determined that, under the Fourteenth Amendment, a parole violator must be given an opportunity for a revocation hearing prior to the final decision of

that petitioner's parole should be revoked based upon violation of three conditions of parole, conditions number 1, number 6 and number 7 (Resp.Exh.A, p. 6). Remembering that petitioner admitted the use of crack cocained the night of the alleged parole violation, and coupling that with the fact petitioner acknowledged sexual intercourse with the purported victim of the rape, there was no need for the Missouri Board of Probation and Parole to present live witnesses at the revocation hearing. Accordingly, there were no adverse witnesses for petitioner to confront or cross-examine.

A sufficient basis existed for the revocation of petitioner's parole and as petitioner has not been denied due process, there is no merit to his contentions in Ground III or IV.

Additionally, in Ground IV, petitioner seems to argue that the Missouri Board of Probation and Parole did not provide answer as to the revocation until approximately four months after the hearing in September of 1992. As demonstrated by the order of revocation (Resp.Exh.A, p. 6), petitioner's parole was ordered revoked on September 24, 1992, the date of the revocation hearing, and only a period of approximately two months after petitioner was origionally arrested on the parole violation warrant (see Resp.Exh.A, pp. 17-19). The total time of approximately two months is not unreasonable. Morrissey v. Brewer, 408 U.S. at 488, 92 S.Ct. at 2604.

CONCLUSION

WHEREFORE, for the reasons herein stated, respondent prays that this Court dismiss this petition without further judicial proceedings.

Respectfully submitted,

JEREMIAH W. "JAY" NIXON
Attorney General

RONALD L. JURGESON
Assistant Attorney General
Missouri Bar No. 35431

Penntower Office Center
3100 Broadway, Suite 609
Kansas City, MO 64111
(816) 889-5000
(816) 889-5006 FAX

Attorneys for Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 7th day of July, 1993, to:

Randy G. Spencer
Reg. No. 176948
Western Missouri Correctional Center
Route 5, P.O. Box 1-E
Cameron, MO 64429

RONALD L. JURGESON
Assistant Attorney General

DEPARTMENT OF CORRECTIONS
BOARD OF PROBATION AND PAROLE
INVESTIGATION REQUEST

TYPE OF RELEASE: ADMINISTRATIVE

To: District 4	Type of Investigation	INTERSTATE COMPACT ONLY
	___ Inter-District	We desire to transfer this
	_X_ Supplemental	person to you state
Date: 06/07/93	___ Interstate	
	___ Executive Clemency	___ As a resident
	___ Personnel	___ Family resides your state
Date due: 06/24/93	___ Partial PSI	___ He/She has employment
	___ Violation Report	___ With your consent

Supplemental Information Requested:

___ Complete PSI	___ Circumstances of Offense	XXX Home
___ Court Record	___ Other Charges Pending	XXX Employment
___ Prior Record	___ Social History	___ Other

Name	Number	DOB	Race/Sex
SPENCER, Randy	PR 176948	03/31/56	W/M

Plea/Crime: PG: Burglary 2nd Degree, PG: Stealing Over $150

Date Sentenced: 11/08/90 11/08/90 00/00/00
Judge/County: JACK JACK

Length of Sentence	Presumptive Release Date	Supervision/Expiration Date
3 years (3, 3 cc)	08/07/93	10/16/93

Home: City Union Mission 1108 E. 10th Street Kansas City, MO
(816)474-9380

Employment: To be obtained

Comments: Your reply to investigation request must be E-Mailed to the requesting institutional parole office with a copy to Central Office. The approved home plan address and Presumptive Release Date should be included in the reply.

Subject has the ADMINISTRATIVE release date of 08/07/93.

Special Conditions: No drinking, drug program

Krista Thompson:(WM07)WMCCP#Q9
Western Missouri Correctional Center
Cameron, MO
(816)632-1390

45

cc: CO -
MBPP-200 (4-92)

USDCWDMoWD
93-0299-CV-W-3-P
Spencer v. Kemna
Resp.Exh. A

(1)

INVESTIGATION REQUEST

Missouri Department of Corrections
Board of Probation & Parole

CHRONOLOGICAL DATA SHEET

NAME: SPENCER, Randy INST. NO.: 176948-W Page 1
SSN: 498-62-6752

Date Dictated: 2-2-93 Date Typed: 02-03-93

PRE-RELEASE REPORT

Randy Spencer has been approved by WMCC for his time credit release date of 8-7-93. Randy Spencer's conduct violations are on the attached time credit eligibility form. He has also received the following conduct violation in addition:

Date	Offense	Disposition
1-4-93	Disobeying an Order	10 days room restriction, 8 hours extra duty

DETAINERS: None

HALFWAY HOUSE: N/A

HOME: City Union Mission
1108 E. 10th Street
Kansas City, MO
816-474-9380

EMPLOYMENT: To be obtained

SPECIAL CONDITIONS: Previous-no drinking and drug program

MEDICAL: None

HOUSE ARREST:

1. ___ Eligible
2. X Not Eligible-Time is too short to Subject's maximum release date of 10-16-93
3. ___ Eligible, Not Recommended

RECOMMENDATION:

It is recommended that Spencer be administratively paroled on 8-7-93 with special conditions of no drinking and a drug program.

(Signature on file)

IPO: John Baker/ds (WMCC) E-Mailed _____

(2)

46

MAR 3-16-93

Attachment A

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
TIME CREDIT ELIGIBILITY

8D

INSTITUTION: WMCC

The inmate listed on this form is hereby certified to the Board of Probation & Parole for consideration for Administrative Parole. This certification for release is based upon the inmates conduct and program participation as reflected in the individuals summary.

INMATE NAME: SPENCER, Randy

REGISTER NUMBER	CREDIT RELEASE DATE	FELONY CLASS
176948	08-07-93	C

CONDUCT VIOLATIONS

(Attach additional sheets as needed)

RULE NO.	RULE TITLE	VIOLATION DATE	DISPOSITION
20	Disobeying an Order	01-04-93	10 day rm/cell restrict. 8 hrs. extra duty
24	Contraband	12-01-92	Prop. Imp/Confisc. 8 hrs. extra duty

PROGRAM PARTICIPATION

Return Parole Violator 8/25/92.

47

I RECOMMEND ☑ APPROVAL ☐ DENIAL

SUPERINTENDENT SIGNATURE: Mic Kemna Pre. Rel 2-2-93

DATE: 1-29-93

(3)

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
BOARD OF PROBATION AND PAROLE
BOARD ACTION SHEET

REVOCATION

TAPE NUMBER: 17455 HEARING NUMBER: 5

NAME: SPENCER, Randy NUMBER: 176948

HEARING DATE: 9-24-92 REVIEW DATE:

☐ INITIAL ☐ RECONSIDERATION ☐ INTERIM ☐ PRE-RELEASE

MINIMUM ELIGIBILITY: GUIDELINE DATE: SALIENT FACTOR SCORE:

GUIDELINE RANGE: TO:

THE BOARD HEREON INSCRIBES ITS FINDINGS AND COMMENTARY AS A MATTER OF PERMANENT RECORD TO BE EXECUTED AS DIRECTED BY THE FOLLOWING ORDER AND DECISION.

☑ REFER TO FULL BOARD
☐ HIGH RISK

RELEASE
☐ PAROLE
☐ CONDITIONAL RELEASE
☐ MAXIMUM RELEASE

DECISION
☐ GUIDELINE
☐ ABOVE GUIDELINE
☐ BELOW GUIDELINE

SPECIAL CONDITIONS
☐ NO DRINKING
☐ DRUG PROGRAM
☐ HALFWAY HOUSE
☐ HOUSE ARREST
☐ DETAINER
☐ MENTAL HEALTH PROGRAM
☐ SEX OFFENDER PROGRAM

VIOLATION
ORDER FOR ARREST 8-13-92
RETURNED 8-25-92
MAX. DATE 10-16-93
NEW MAX. DATE Time remains the same
☐ ABSCONDER
☐ SENTENCE OUTSIDE DAI

DECISION AND REMARKS

revoke - release 10.16.93
B

DECISION AND REMARKS

Revoke - Release 10-16-93
Max
Conditions 1-6-7
Viol. Reports
MSC

DECISION AND REMARKS

Revoked / Release 10-16-93
MAX
BPP

DECISION AND REMARKS

Revoke-
Release 10-16-93
Lm

DECISION AND REMARKS

AGREE
BN

48

(4)

Missouri — John Ashcroft, Governor

DEPARTMENT OF CORRECTIONS — Dick D. Moore, Director

Board of Probation and Parole

Cranston J. Mitchell
Chairman & Compact Administrator

Ben W. Russell
Victoria C. Myers
Betty J. Day
Anthony G. Spillers
Board Members

Paul D. Herman
Chief State Supervisor

Patricia A. Parker
Secretary & Deputy Compact Administrator

9-14-92

Dear Sir: Randy Spencell 176948

This is to advise that you have been set for a Revocation Hearing before the Missouri Board of Probation and Parole on September 24, 1992 9:00 AM in the Parole Hearing Room at the Fulton Reception and Diagnostic Center.

It is your responsibility to notify anyone whom you wish to appear in your behalf at the hearing on that date.

Sincerely,

MISSOURI BOARD OF PROBATION AND PAROLE

Peggy L. McClure

Peggy L. McClure
Institutional Parole Officer

PLM/slr

**I have received a copy of this letter.

Subject Randy Spencer

Date 9-14-92

AN EQUAL OPPORTUNITY EMPLOYER
Services provided on a Non-discriminatory basis

(7)

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
BOARD OF PROBATION AND PAROLE

WAIVER OF REVOCATION HEARING OR REQUEST FOR REVOCATION HEARING

SIGN AND DATE ONLY ONE OF THE FOLLOWING STATEMENTS:

I. WAIVER OF REVOCATION HEARING

I, _____ (NAME) , _____ (NUMBER) have been returned to the Missouri Division of Adult Institutions for alleged violation of supervision. I am aware of my rights to a hearing, as stated in Section 217.720.

> "The Board shall either order him discharged from such institution or other detaining custody or shall cause the inmate to be brought before it for a hearing on the violation charged, under such rules and regulations as the Board may adopt. If the violation is established and found, the Board may continue or revoke the parole or conditional release, or enter such other order as it may see fit. If no violation is established and found, then the parole or conditional release shall continue."

Having been fully informed, and having full knowledge of these rights in the aforementioned section, I DO HEREBY WAIVE MY RIGHTS TO A REVOCATION HEARING BY THE BOARD OF PROBATION AND PAROLE.

NAME	NUMBER	DATE

II. REQUEST FOR REVOCATION HEARING

I, _____ (NAME) , _____ (NUMBER) HEREBY REQUEST A REVOCATION HEARING before the Board of Probation and Parole, as provided for in the Statute as cited in Item I, above.

52

NAME	NUMBER	DATE
Randy Spencer	176948	9-14-92
DATE RETURNED TO DIVISION OF ADULT INSTITUTION	**SIGNATURE WITNESSED BY**	**DATE**
8/25/92	Peggy L. McClure	9-14-92

MO 931-1887 (4-91)

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
BOARD OF PROBATION AND PAROLE

REVOCATION REPORT

__X__ Parole
_____Conditional Release

Name: SPENCER, Randy No.: 176948 Date: 9-14-92

DATE INTERVIEWED: 9-14-92
Preliminary Hearing: __X__ Waived _____Held _____N/A
Client provided with appropriate documents: __X__ Yes _____No
MBPP-247 - Request for Attorney: _____ Offered __X__Not offered

---

Offense:	PG: Burglary 2nd Degree; Stealing Over $150.00
Sentence:	3 years (3,3 cc)
County:	Jackson
Date Committed to DAI:	11-14-90
Date Paroled or Conditionally Released:	4-16-92
Order for Arrest and Return:	8-13-92
Date Taken Into Custody:	7-16-92
Date Returned to DAI:	8-25-92
Maximum Release Date:	10-16-93

TYPE OF VIOLATION	OFFICER RECOMMENDATION
__X__ (1) New Offense	_____ (1) Reinstate
_____ (2) Absconder	__X__ (2) Revocation
__X__ (3) Technical	

I. CONDITIONS AND CIRCUMSTANCES

#1-LAWS: by being arrested on 7-16-92 for Rape.

#6-DRUGS: by having in his possession and using a controlled substance, to wit: Cocaine.

#7-WEAPONS: by having in his possession or using as a dangerous weapon, to wit: screw driver.

Regarding the circumstances pertaining to the above alleged violated conditions, the following information was taken from the Initial Violation Report submitted 7-27-92 completed by District #4 Officer Jonathan Tintinger.

Pertaining to Condition #1-LAWS and #7-WEAPONS: According to the Initial Violation Report submitted, Spencer was arrested on a 20 hour hold on the charge of Rape by the Kansas City Police Department on 7-16-92. According to the offense reports obtained, Spencer was introduced to the victim, Gina Bartlett, in a Kansas City area crack house, located in Kansas City, MO. After smoking Crack Cocaine, the victim was asked by Spencer for

a ride home at approximately 6:00 p.m. The victim then gave Spencer a ride home and agreed to come upstairs, subsequent to his offer to give her gas money. After entering Spencer's apartment, Spencer and the victim smoked more Crack Cocaine, after which the victim attempted to leave the apartment. Spencer then allegedly jumped in front of her, and pushed her to the floor. The victim stated that Spencer got on top of her and started striking her in the face with his fist advising her to shut up. Allegedly, Spencer continued to punch her in the face until she begged him to stop and removed her clothes. Spencer then had sexual intercourse with the victim, removing his penis in time to ejaculate on the victim. Spencer then got dressed and told the victim to get dressed and directed her to drive him back to the drug house in order to purchase more Cocaine. Upon arrival at the drug house, the victim exited the vehicle and informed persons at the drug house that she had just been raped by Spencer. Spencer was chased away from the house by 2 of the male occupants and escaped. The victim was taken to the Independence Regional Hospital and received treatment for the Rape. The attending physician's report at the hospital indicated that the victim was visibility upset, crying at times, and evidenced "bruises on the left side of mouth with moderate swelling, abrasion of inner-upper left lip, tender but not discolored on the right angular jaw." On 6-23-92 the victim identified Spencer as the rapist from a 6 picture color photo spread. Spencer gave a statement to the police officers that the victim's purse was on top of his refrigerator and he attempted to try to get the dope and pushed her away .... she fell and landed on his bed. When questioned whether or not he had hit the victim in the head with his hands, Spencer replied that he had not done it intentionally, or with his knowledge, however, it may have happened when he pushed her away from the purse. Spencer claimed to the detectives that the 2 had engaged in consensual intercourse. The victim reported that Spencer had a screw driver which he pressed against her side at some point during the alleged rape, but she was not clear at what point that happened. A warrant had not been issued to date of the violation report on this new offense.

Pertaining to Condition #6-DRUGS: As noted in the Initial Violation Report, Spencer allegedly met the victim at a drug house and they both smoked Crack Cocaine.

Regarding Condition #1-LAW and #7-WEAPONS: Spencer denies violating these conditions of parole.

Regarding Condition #6-DRUGS, Spencer admitted to this officer that he had in fact used Cocaine and advised this officer "so what". During the violation interview with this officer, Spencer portrayed a negative attitude and was somewhat verbally aggressive. He intends to have no witnesses at his hearing.

REVOCATION REPORT

NAME: SPENCER, Randy No.: 176948 Date: 9-14-92 Page 3

II. OTHER VIOLATIONS

None

III. RECOMMENDATION

Spencer appears before the Board on his first violation after being arrested for Suspicion of Rape. It does not appear that a warrant was ever issued for this offense. Spencer does admit to using Crack Cocaine, however, denies violating Conditions #1 and #7. Based upon the information presented in the violation report, there does appear to be significant evidence that Spencer has violated the conditions of his parole as stated. This officer would respectfully recommend to the Board that Spencer's parole supervision be revoked and he be scheduled for a hearing at a time deemed appropriate by the Board. Further parole consideration will be necessary in this case.

MAXIMUM RELEASE DATE: 10-16-93

Respectfully submitted,

Peggy L. McClure
Institutional Parole Officer
Fulton Reception and Diagnostic Center

PLM/slr

[illegible] DEPARTMENT OF [illegible] [illegible]
[illegible] ADULT INSTITUTIONS
FACE SHEET

REGISTER NO: 176948 COMMITMENT NAME: SPENCER RANDY G
DID NO: MO00414629 TRUE NAME: SPENCER RANDY G
SSN: 498-62-6752 AGE AT COMMITMENT: 34
FBI NO: 775565M5

* * ALIAS NAMES * *

SPENCER GLENN : SMOTHERS RANDY
SPENCER RANDY : SPENCER RANDY G
SPENCER R :

BIRTH DATE: 03 31 1956 BIRTH PLACE: BLOOMINGTON IL ETHNICITY: NON-HISPANIC
HEIGHT: 5 FT. 11 IN. WEIGHT: 175 SEX: MALE RACE: WHITE
BUILD: STOCKY HAIR: BLONDE/ EYES: GREEN COMPLEXION: FAIR

* * SCARS MARKS AND TATTOOS * *

CODE-1: TAT R ARM DESCRIPTION-1: BOWLING BALL #1
2: TAT UR ARM 2: RANDY ON ROSE
3: TAT LF ARM 3: TIGER
4: TAT L WRS 4: MOM, DAD, FLOWER
5: TAT R WRS 5: TAMMY, STAR

RELIGIOUS PREFERENCE: BAPTIST MARITAL STATUS: NEVER MARRIED

* * EMERGENCY ADDRESS * *

NAME: SMOTHERS ROBERT RELATIONSHIP: STEP-FATHER
STREET/CITY/STATE/ZIP: 8A-15 TERRA LINDA TRL WARRENSBURG MO 64093
TELEPHONE NUMBER: 816-429-1471

NAME: WILSON JUDY RELATIONSHIP: SISTER
STREET/CITY/STATE/ZIP: 706 DITMAN KANSAS CITY MO 64127
TELEPHONE NUMBER: 816-252-9382

* * MILITARY SERVICE * *

BRANCH: NEVER SERVED TYPE OF DISCHARGE: -DISCHARGE DATE: 00 00 0000

* * PRIOR RECORD * *

PROBATION / MO: 02 PAROLE / MO: 03 IMPRISONMENT / MO: 03 ESCAPE/ MO: 00
OTHER: 00 OTHER: 00 OTHER: 00 OTHER: 00
PRIOR REGISTER NUMBERS:
167629 048909 022238

* * OCCUPATION OR TRADE * *

OCCUPATIONS: LABORER (GENERAL)

* * SENTENCE SUMMARY * *

RECEIVED DATE: 11 14 1990 RETURNED FROM: CREDIT TIME RELEASE DATE: 08 25 199[illegible]
NUMBER OF SENTENCES: 2 MAXIMUM AGGREGATE RELEASE DATE: 10 16 199[illegible]
TOTAL SENTENCES LENGTH: 3 TIME CREDIT RELEASE DATE:

* * COMMENTS * *

3 YRS (3.3CC)
PAROLED: 4-16-92; RET PV: 8-25-92.

RECEIVER NO: 176948 COMMITMENT NAME: SPENCER RANDY R

* * PRESENT CONVICTIONS * *

#:001**
CAUSE NO: CR90-4834 CLASS: C OCN: MO CODE: 1402099O NCIC: 2204
FS:BURGLARY 2
SENTENCE DATE: 11 08 1990 LENGTH: 003 00 00
SENTENCE COUNTY: JACK RECEIVED: 11 14 1990 JAIL: 0028
SENTENCE START DATE: 10 17 1990 RETURN: 09 25 1992 NON-CREDITED:
MAXIMUM RELEASE: 10 16 1993 MAX: 10 16 1993 DISC TYPE:
CC/CS: REL TO SEQ: SENT STAT: ACTIVE DISC DATE:

#:002**
CAUSE NO: CR90483-4 CLASS: C OCN: MO CODE: 15010990 NCIC: 2399
FS:STEALING OVER $150.00
SENTENCE DATE: 11 08 1990 LENGTH: 003 00 00
SENTENCE COUNTY: JACK RECEIVED: 11 14 1990 JAIL: 0028
SENTENCE START DATE: 10 17 1990 RETURN: 08 25 1992 NON-CREDITED:
MAXIMUM RELEASE: 10 16 1993 MAX: 10 16 1993 DISC TYPE:
CC/CS: CC REL TO SEQ: 001 SENT STAT: ACTIVE DISC DATE:

(14)

GDK NOV 13 1990

IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

176948 4B

STATE OF MISSOURI

PLAINTIFF

vs.

RECEIVED
NOV 14 1990
RECORDS OFFICE

NO. CR90-4834

DOCKET ACJ

DIVISION 101

Randy G. Spenser DEFENDANT Fulton Diagnostic Center

167071-2

JUDGMENT
(GUILTY PLEA - NO PROBATION)

On November 8 19 90, came the attorney for the State Robert Adams

and defendant appeared in person and by attorney, Kent Hall

It is adjudged that defendant, having been found guilty upon a plea of guilty entered on November 8 19 90, of the

offense(s) of Count 1 - Burglary 2°

Count 2 - Stealing over $150.00

4-16-92
10-16-92
10-16-93

a class C felony/misdemeanor is guilty of said offense(s).

It is ordered and adjudged that defendant is sentenced and committed to the custody of the Division of Adult Institutions/Jackson County Department of Corrections for imprisonment for a period of Three years each count to run concurrent

Acknowledgment read by the Court and signed by the defendant.

It is ordered that the Court Administrator deliver a certified copy of this judgment and commitment to the Jackson County Department of Corrections and that the copy serve as the commitment of defendant.

It is ordered and adjudged that the State of Missouri have and recover from defendant the sum of $46.00 for the Crime Victims' Compensation Fund, and that execution issue therefor.

It is ordered and adjudged, pursuant to Chapter 600 R.S.Mo., that the State of Missouri have and recover from defendant the sum of $ 50.00 for services of the Public Defender, and that execution issue therefor.

November 8, 1990
DATE

$46 Crime Victims' Compensation Fund unpaid.
D.C.A.

JUDGE

DRCT 1350 - 11/84 ORIGINAL

(15)

"The Jackson County Department of corrections hereby endorse upon this commitment that this person spent 29 days in jail.

Annette Jones
Criminal Records Unit

10-17-90 thru 11-14-90

78

59

TRUE COPY - ATTEST
CIRCUIT COURT OF JACKSON COUNTY, MO
COURT ADMINISTRATOR'S OFFICE
DEPARTMENT OF CRIMINAL RECORDS
BY Sam Brunelle DC'A

16

OCN 870572?0
OFFENSE CYCLE NO.

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
BOARD OF PROBATION AND PAROLE

405 East 13th Street
5th Floor
Kansas City, MO 64106
(816)889-2271

VIOLATION REPORT

Name: SPENCER, Randy G. No.: IN176948-P Date: 7/27/92

TYPE OF CASE: Board
TYPE OF REPORT: Initial

Crime: PG: Stealing O/$150; Burglary II Sentence: 3 years (3,3 cc)
Date Supv. Began: 04/16/92 Expires: 10/16/93

TYPE OF VIOLATION:
Felony (1)

OFFICER'S RECOMMENDATION:
Continuance (1)

VIOLATION INTERVIEW:
Date: 7/17/92 Time: 4:20 p.m. Place: Jackson County Jail
1300 Cherry, KCMO 64106

X Client Advised that Any Statements May be Included in Violation Report
X Client Given Booklet "Rights of Alleged Violator"
X Waived Preliminary Hearing _ Requested Preliminary Hearing
IN CUSTODY? X Yes Date: 7/17/92 Location: Jackson County Jail

I. Introduction

Violation of Parole Condition #1, by allegedly committing the offense of Rape.

Violation of Parole Condition #6, by the use of Cocaine.

Violation of Parole Condition #7, by use of a dangerous weapon.

II. Particulars of Violation

Spencer was arrested on a twenty-hour hold on a charge of Rape by Officers of the Kansas City, Missouri Police Department on 7/16/92, at an unknown time and unknown place, and subsequently held on the authority of a warrant issued by this officer dated 7/17/92.

Circumstances of the violation of Condition #1 are as follows: According to KCMO Police Department Report #92-077642, on 6/3/92, Spencer was introduced to the victim, Gina Bartlett, in a Kansas City Area Crack House, located near 24th and Park Streets, KCMO. After smoking crack, the victim was asked by Spencer for a ride home at approximately 6:00 p.m. The victim then gave Spencer a ride home and agreed to come upstairs, subsequent to his offer to give her gas money. After entering Spencer's apartment, Spencer and the victim smoked more crack, after which the victim attempted to leave the apartment. Spencer then allegedly jumped in front of her and pushed her to the floor. The victim stated that he got on top of her and started striking her in the face with his fists and told her to shut up. Allegedly, Spencer continued to punch her face until she begged him to stop and removed her clothes. Spencer then enjoyed sexual intercourse with the victim prior to his removing his penis in time

6

17

MRPP-162

to ejaculate on the victim. Spencer then got dressed and told the victim to get dressed, after which he directed the victim to drive him back to the drug house in order to purchase more Cocaine. Upon arrival at the drug house, the victim exited the vehicle. The victim informed the persons at the drug house that she had just been raped by Spencer. Next, Spencer was chased away from the house by two of the male occupants and escaped. The victim entered the drug house, telephoned her parents, and was picked up at the house by her father and brother, prior to receiving treatment for the rape at Independence Regional Hospital. The attending physician's report at Independence Regional Hospital indicated that the victim was visibly upset, crying at times, and evidenced "bruises on the left side of mouth with moderate swelling, abrasion of inner-upper left lip, tender but not discolored on right angular jaw." Members of the KCPD were dispatched on the reported rape by hospital personnel. On 6/18/92, officers of the KCMO Police Department Sex Crimes Unit responded to an anonymous tip that the name of the rapist was Randy Spencer. An ALERT Systems check of Randy Spencer by police detectives provided additional descriptive information as well as a mug shot of Spencer obtained from the Police Records Bureau. On 6/23/92, the victim identified Spencer as the rapist from a six-picture color photospread. After being detained for questioning regarding this offense on 7/16/92, Spencer told investigating detectives that "her purse was on top of my refrigerator, and I attempted to try to get to the dope and pushed her away.....she fell and landed on my bed." When asked by detectives whether or not he had hit the victim in the head with his hands, Spencer replied, "not intentionally, not with my knowledge, it may have happened when I pushed her away from the purse." However, Spencer claimed to investigating detectives that the two had engaged in consensual sexual intercourse.

This case was turned over on 7/17/92 from the KCMO Police Department Sex Crimes Unit to the Jackson County Prosecuting Attorney's Office. As of the date of this writing, no State charges have been formally filed.

In response to the above violation, Spencer had no response.

Circumstances of the violation of Condition #6 are as follows: According to the KCMO Police Department Report #92-077642, Spencer admitted to smoking Crack Cocaine, on 6/3/92.

In response to the above violation, Spencer admitted the violation.

Circumstances of the violation of Condition #7 are as follows: According to the above-mentioned KCPD Report #92-077642, the victim stated that Spencer had a screwdriver which he, "pressed" against her side, at some point during the alleged rape, but that she wasn't clear at what point that happened.

In response to the above violation, Spencer denied the violation.

III. Other Violations

None.

IV. Recommendation

This officer's recommendation is for Continuance and placement in Farmington Treatment Center/Mineral Area Treatment Center. Spencer has admitted to smoking Crack Cocaine within two weeks of being released from Fellowship House, on 5/21/92. Spencer received a violation report from Fellowship House staff, relative to using Cocaine on or about 4/2/92. Spencer has admitted before to the use of "anything I can get my hands on," relative to drugs. Yet, of greater concern to the undersigned officer than Spencer's cavalier attitude regarding drug use while on parole, is the fact that Spencer admitted to investigating detectives that he pushed the victim until she fell yet can't clearly recall whether he "intentionally" assaulted her, although "it may have happened." This officer contends that Spencer, regardless of the disposition of this new case, is obviously a violent and impulsive individual who represents a clear danger to the community. This officer contends that Spencer has every intention of continuing to use drugs whenever possible, despite what help is offered him. Randy Spencer is a registered sex offender, having been given a five-year prison sentence for Sodomy in 1983. However, an ultimate recommendation based on the alleged violations of Conditions #1 and #7 is being held in abeyance pending disposition of this new rape charge, by the Jackson County Prosecuting Attorney's Office. In the event formal charges are ultimately filed, a separate recommendation will be forthcoming. Meanwhile, in view of the alleged rape, it is deemed necessary to immediately remove Spencer from the community. The Prosecuting Attorney's Office has advised it will be a month or so before the case is reviewed for possible filing of charges. No objection was posed to returning Spencer as a parole violator in the interim.

V. Availability

Spencer is currently in the custody of the Jackson County Jail, 1300 Cherry, Kansas City, Missouri 64106, and is immediately available to the Board.

Respectfully submitted,

Jonathan L. Tintinger/04-07
State Probation & Parole Officer
Kansas City, MO
District #4

Mouton
Unit Supervisor

Date:_____

JLT/bar 08/06/92

SIGNATURE ON FILE
WAIVER ON FILE

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER,)
Petitioner,)
vs.) No. 93-0299-CV-W-3-P
MIKE KEMNA,)
Respondent.)

ORDER

Upon motion of respondent, and for good cause shown, it is ORDERED that respondent is granted an enlargement of time up to and including July 7, 1993, in which to file a response to the petitioner's petition as directed by this Court's order to show cause.

IT IS SO ORDERED.

ELMO B. HUNTER
UNITED STATES DISTRICT JUDGE

Kansas City, Missouri,
Dated: 7-13-93.

63

ORIGINAL

Document # 14

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER,)
Petitioner,)
vs.) Case No. 93-0299-CV-W-3-P
MIKE KEMNA,)
Respondent.)

PETITIONER'S MOTION AND REQUEST FOR
FINAL DISPOSITION OF THIS MATTER

Comes now, the petitioner, Randy G. Spencer, pro-se, and moves this court to make a final adjucation of this matter and in support of this request, this petitioner will state as follows:

1. That this petitioner is moving this court for a final adjudication of this matter, because this petitioner has been granted "good time" and this petitioner may be released from confinement, on August 7, 1993, and if a final disposition of this matter is not reached by August 7, 1993, then this petitioner will suffer irreparable harm, by being denied the rights and benifits which are secured to this petitioner by the United States Constitution, through the use of the Writ of Habeas Corpus, resulting in this petitioner being illegally confined and restrained from his liberty, for (13) months of this petitioners life, without due process of the law, and leaving this petitioner with no way to vindicate himself, during this time.

2. That if this petitioner is released from confinement on August 7, 1993 and if this matter is not adjucated by then, then all of this petitioners time, money, and efforts, will have been for nothing, as this court knows that when this petitioner is released, and if the issues of this petitioners petition for Writ of Habeas Corpus are not resolved by then, then this petitioners petition and the issues thereof, become moot, as no relief can be granted to this petitioner, by way of the Writ, if this petitioner is no longer in confinement.

64

(1)

Document # 15

3. That this petitioner realizes that su a request is highly unusual, but under these eircumstances, not entirely unreasonable, esspicailly in light of the facts that when this petitioner was arrested and detained for alleged parole violation, this petitioner had (14) months left to serve on this petitioners sentence, and with it taking over two (2) months for this petitioner to even see the parole board, for revocation, amother (6) six months exhausting State Judicial Remedies, (2) two months getting a show cause order issued in this case, and (2) two more months spent on the respondent requesting extensions of time, all of which has caused this petitioner to virtually serve out the remainder of his sentence, and leaving this petitioner unable to regain his freedom, by the use of the Writ.

4. That this court has the jurisdicition to invoke a final adjucation and judgement in this matter, through the Federal Rules of Civil Procedure, and pursuant to, in accordence with, but not limited to, Titles 28 U.S.C. §2241 et seq. (1993), §1331 Federal Question, § §2201-2202 Declatory Judgement, or any other remedy that this court may have at its disposial.

5. That this petitioner believes that the respondents attornies have known about this petitioners possibale release, on August 7, 1993 and that the true reasons behind the respondents requests for extensions of time, was to vex this case as long as possible, all the while, waiting for this petitioner to be released from confinement, then to move this court for a dismissal of this case, on the grounds that no relief can be granted to this petitioner, by way of the Writ, because this petitioner would no longer be in confinement, making this petitioners case, moot.

6. That this courts order of May 13, 1993, and granting this petitioners claimes, a liberal construction, under Haines vs. Kerner, 404 U.S. 519 (1972), this court has assertained from this petitioners petition, that this petitioner was challenging the revocation of this petitioners parole and that this petitioner had listed the following grounds for relief:

(1) That this petitioner was denied the right to a preliminary hearing concerning alleged parole violations;

(2) That this petitioners conditional release date was suspended without a hearing;

(3) That this petitioners parole revoca n hearing was constitutionally flawed and did not comport with the principles of due prosess; and

(4) That this petitioner was denied the oppertunity to review the evidence relied on in revoking this petitioners parole.

7. That this petitioner will attempt to substaniate the grounds, listed herein, by way of this courts order on May 13, 1993, as the grounds for which this petitioner seeks relief and a final adjucation of this matter.

8. That on July 16, 1992, this petitioner was "picked up", not arrested, by the Kansas City Police Department, for the purpose of a (20) twenty hour investigation, into the alligation of the crime of rape.

9. That before the (20) twenty hour investigation was over, on July 17, 1992 this petitioners parole officer issued a warrent for this petitioners arrest, for parole violation, and, this petitioner was taken to the Jackson County Jail, in Kansas City, Missouri. Please see exhibit A.

10. That also on July 17, 1992 this petitioners parole officer conducted an interview with this petitioner and this petitioners parole officer handed this petitioner a copy of the warrent for arrest and detention of this petitioner, a copy of the rules and regulations of the Missouri Department of Probation and Parole, in a handbooklet entitled, "Rights of Alleged Parole Violator to Preliminary and Revocation Hearing", and, at the ill-advice of this petitioners parole officer, who stated that he had probable cause to violate this petitioner and that "this is only a formality", he asked this petitioner to sign a waiver to a preliminary hearing on the (2) two alleged violations of the conditions of this petitioners parole, which where shown on the warrent for arrest and detention of this petitioner, and this petitioner was given a copy of this signed waiver as well. Please see exhibits A and B.

11. That after this petitioner had signed the waiver, exhibit "B", and was able to read and comprehend what this petitioners rights actually where, at a preliminary hearing, even under the rules and regulations of the Missouri Department of Probation & Parole, did this petitioner realize that he should not have

signed the waiver of his right to a preliminary hearing, on the (2) two alleged parole violations, that where on the warrent for arrest and detention of this petitioner.

12. That on approximatly August 7, 1993, while this petitioner was still in the custody of the Jackson County Jail, this petitioners parole officer brang this petitioner a copy of the violation report, prepaired by this petitioners parole officer, and as this petitioner had read this violation report, this petitioner noticed that this petitioner was now being violated for (3) three violations of the conditions of this petitioners parole, and not just the (2) two that where on the warrent for arrest and detention of this petitioner. Please see exhibit C and compair to exhibit A.

13. That this petitioner "did not sign a waiver" of his rights to a preliminary hearing and the rights secured therein, on this third alleged violation of the conditions of this petitioners parole, and for this petitioner to be brought back to prison and violated (revoked) on this third alleged violation of this petitioners parole, without first affording this petitioner with a preliminary hearing, and the rights secured therein, was to have violated this petitioners rights under the 5th and 14th Amendments to the Constitution, to not be deprived of "liberty" without Due Process of Law, and even the Supreme Court Justice BRENNAN has stated:

> "I agree that a parole may not be revoked, consistently with Due Process Clause, unless the parolee is afforded, first, a preliminary hearing . . . . . ."

Morrissey v Brewer, 408 U.S. 471, 92 S.Ct. 2593, 2605 (1972) and Gagnon v Scaprelli, 411 U.S. 778, 93 S.Ct. 1756 (1973), however, this petitioners parole was revoked, without first affording this petitioner with a preliminary hearing on the third alleged violation of the conditions of this petitioners parole.

14. That by not affording this petitioner with a preliminary hearing and the rights secured therein, on the third alleged violation of the conditions of this petitioners parole, as stated on the violation report,(exhibit C), this petitioner was denied his right and ability to defend himself, to present witnesses and documented evidence, the right to confront and cross-examine any

adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation), and disclosure of the evidenc against this petitioner, all of which might have been used and asserted by this petitioner, to prove that there might not have been probable cause to take this petitioner back to prison.

15. That also by not affording this petitioner with a preliminary hearing and the rights secured therein, on the third alleged violation of the conditions of this petitioners parole, this petitioner was prejudiced, in that if this petitioner was afforder a preliminary hearing and the rights secured therein, on the third alleged violation of the conditions of this petitioners parole, then this petitioner might have been able to shed enough light to have cleared himself on the third alleged violation, and this petitioner, as well, might ha.. been able to clear himself on the first (2) two alleged violations of the conditions of this petitioners parole, which had caused this petitioner to be arrested and detained, as all three (3) alleged violations of the conditions of this petitioners parole, where related, and to have cleared this petitioners self on one alleged violation, was to have possibly cleared this petitioners self, on all three (3) alleged violations of the conditions of this petitioners parole.

16. That this petitioner remained in the custody of the Jackson County Jail, in Kansas City, Missouri, until August 25, 1992, when this petitioner was transported back to the Missouri Department of Corrections, at the Fulton Reception & Diagnostic Center,(F.R.D.C.), in Fulton, Missouri.

17. That while this petitioner was detained at the F.R.D.C., on September 14, 1992, this petitioner was interviewed by an institutional parole officer, a Peggy McClure.

18. That at this interview, on September 14, 1992, Peggy McClure handed this petitioner a copy of the warrent for arrest and returen of this petitioner, a copy of the scheduling notice for this petitioners revocation hearing, and a copy of the form in which this petitioner had requested a revocation hearing on. Please see exhibits D, E, and F.

19. That also at this interview, on Septemoer 14, 1992, Peggy M^cClure imformed this petitioner that it was this petitioners responsibility to contact witnesses and to secure counsel, for this petitioners revocation hearing, on September 24, 1992, and that she was authorized to offer this petitioner (1) one stamp and a phone call, for this petitioner to contact witnesses and to secure counsel with, and further, that this petitioner was being brought in front of the board, for violation of Laws, Drugs, and the posession of a dangerous Weapon, all of which this petitioner denied.

20. That on September 20, 1992, this petitioner wrote the institutional records office, at F.R.D.C., to find out if this petitioner had any holds, warrents or detainers, placed against this petitioner. Please see exhibit G.

21. That this petitioner was reading in his handbooklet, entitled "Rights of Alleged Violator To Preliminary and Revocation Hearing", issued under the authority of the Missouri Department of Probation and Parole, and on pages 8 & 9, of this booklet, this petitioner noticed, among other things, that this petitioner had been given the right to have a represenative of "this petitioners choice", at this petitioners revocation hearing, on September 24, 1992, and that such choices may include, family members, friends, employers and legal counsel. Please see exhibit H.

22. That also on September 20, 1992, this petitioner, being faced with very littel time and virtually no money, had wrote the institutional parole officeer, Peggy M^cClure, and this petitioner requested that this petitioner be allowed to have an inmate paralegal, a David Graham, at F.R.D.C., to be present and this petitioners legal counsel, at this petitioners revocation hearing, on September 24, 1992. Please see exhibit I, with the original being on file with the Supreme Court for the State of Missouri, under case number, 75670.

23. That on September 21, 1992, this petitioners note, exhibit I, was returned to this petitioner, with this petitioners request being denied. Please see exhibit I.

24. That although the State of Missouri has not incorporated into its legislation, the rights of a parolee at and in a revocation hearing, according to Missouri Practice, volume 19, section

551, this petitioner did have the right to a represenative, of this petitioners "choice", at this petitioners revocation hearing, on September 24, 1992, and appearently this is endorsed, along with other rights, by the Supreme Court in, Black v Ramano, U.S. 105, S.Ct. 2254, 85 L.Ed.2d 636 (1985); see also, Abel v Wyrick, 574 S.W.2d 411 (Mo. banc 1978).

25. That even under the rules and regulations of the Missouri Department of Probation & Parole, exhibit H, this petitioner had a liberty interest involved, in this petitioner having a represenative of this petitioners "choice", at this petitioners revocation hearing of September 24, 1992, and courts have held that a"liberty interest" could be found in state statutes, judicial decrees, or by rules and regulations; see, Kozlowski v Coughlin, 539 F. Supp. 852 (S.D.N.Y. 1982); Parker v Cook, 642 F.2d 865 (1981); and, Pugliese v Nelson, 617 F.2d 916 (1980). Please see exhibit H.

26. That also, when this petitioner requested a represenative of this petitioners "choice", this petitioner chose to be represented by an inmate para-legal, at F.R.D.C., to represent this petitioner at this petitioners revocation hearing, on September 24, 1992, but when this petitioners request was denied, in essance, this petitioner was denied the right to legal counsel, at this petitioners revocation hearing, as the requirements of due process are the same for probation and parole revocation hearings, see, Baker v Wainwright, 527 F.2d 372 (1976), and the requirement of due process is,

> ". . . counsel should be provided for indigints on probation or parole cases where, after being imformed of his right to request counsel, the probationer or parolee makes such a request . ."

Gagnon v Scaprelli, 411 U.S. 778, 93 S.Ct. 1756, 1760 n. 5 (1973).

27. That this petitioner is not claiming as a ground for relief, that this petitioner was denied his right to be imformed of the right to request counsel, although this surely should be considered, but when this petitioner was told that it was this petitioners "responsibility" to secure counsel, for this petitioners revocation hearing, and with this petitioner having virtually no money, when this petitioner wrote the note requesting that an in-

mate para-legal, at F.R.D.C., be allowed to present this petitioner, at this petitioners revocation hearing, if the State of Missouri was not going to provide this petitioner with legal representation, then this petitioner should not have been denied the right to have a represenative of this petitioners choice, but with this petitioner not being imformed of his right to request counsel, and that counsel might be provided for this petitioner, if this petitioner was indigint and denied the alligations, along with this petitioner not being allowed to have a represenative of this petitioners "choice", choice being an inmate para-legal, then this petitioners minimum due process rights, as described in either Morrissey v Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972), or Gagnon v Scaprelli, 411 U.S. 778, 93 S.Ct. 1756 (1973), were violated and denied to this petitioner.

28. That if nothing else, when this petitioner wrote the note (exhibit I), to Peggy McClure, at F.R.D.C., an inquiry should have been held to determine if legal counsel, should have been appointed for this petitioner, by the Missouri Department of Probation & Parole, but it wasn't.

29. That on September 24, 1992, this petitioners revocation hearing, went as scheduled, without informing this petitioner of his right to confront and cross-examine witness, and by not imforming this petitioner of his right to confront and cross-examine witnesses, this petitioners due process rights, may have been violated. See, Lawrence v Smith, 541 F.Supp. 179-187 (W.D.N.Y. 1978). This petitioner is not claiming this as a ground for reliefe, but surely this should be considered.

30. That this petitioners revocation hearing, on September 24, 1992, was centered arround this petitioner being questioned about the alligation of rape against this petitioner, *with* this petitioner consistintly challenging and denying the accuracy of the violation report, and one parole board member started the hearing off, by stating, I see here that the violation repot says that you (meaning this petitioner) have been arrested and charged with the crime of rape, and immeadiatly this petitioner spoke up and stated that this petitioner had not been charged with the crime of rape and this petitioner handed the board member, exhibit G, to show that even some (70) days later, this petitioner

had still not been charged with the crime of rape, or any other crime, sence this petitioner had been put on parole.

31. That even with the knowledge that this petitioner had not been charged with the crime of rape, this one parole board member continued to question this petitioner about the alligation, with this petitioner continuing to deny it.

32. That this one parole board member stated that the violation report states that this petitioner had used a weapon (screwdriver) against the alleged victim, and this petitioner pointed out that on page two (2) of the violation report, that the report stated that the alleged victim wasn't "clear" as to what point the weapon "might" have even been used, clearly putting doubt on the accuracy of the alleged victims statement and the violation report or if this petitioner even used a weapon, at all, against anyone.

33. That this one parole board member started showing signs of irratation and stated that the violation report states that this petitioner had admitted to useing drugs, but this petitioner denied this alligation.

34. That this one parole board member really got irratated at the proceeding of this petitioners revocation hearing, and slamming his hands on the tabel, this one parole board member had stated, you mean that you are not going to admit to these violations, and this petitioner said no, as the violation report was untrue and the alligations against this petitioner are wrong and that this petitioner should not be getting violated.

35. This petitioners revocation hearing, on September 24, 1992, was ended, but this petitioner was never told "why" there where no adverse witnesses present and against this petitioner at this petitioners revocation hearing, but for the purpose of this court, the hearsey violation report, exhibit C, clearly states that this petitioner was at the K.C.P.D, on July 16, 1992, on a "twenty hour hold", and that the alleged violations, #1, LAWS, and, #7, WEAPONS, where being held in abeyance, but the Missouri Department of Probation & Parole revoked this petitioners parole, on all three alleged violation, even though this petitioner had not violated any laws or been found to be in posession of any dangerous weapons. Please see exhibit N.

36. That for the purposes of this court, this date, this petitioner has not been arrested and/or convicted of any crime, nor has this petitioner been found to be in posession or tested positive, of any drugs, sence this petitioner was placed on parole, on April 16, 1992, nor has this petitioner been found to be in posession of any type of a dangerous weapon, nor has this petitioner been found to be in use of or admitting to the use of drugs, sence this petitioner was placed on parole, on April 16, 1992 and the Missouri Department of Probation & Parole should not have revoked this petitioners parole, on September 24, 1992, for violating the conditions of this petitioners parole, as described on exhibits F & N, and according to Mo. Rev. Stat. section 217.720;

> "If no violation is established and found, then the parole or conditional release shall continue. . ."

37. Taht a violation of the conditions of this petitioners parole, was not established or found on violations #1. Laws & #7. Weapons, and the only violation of the conditions of this petitioners parole that "might" have been established, was the alleged use of drugs, and that is only because the violation report, hearsey, stated that this petitioner had admitted to useing drugs, which this petitioner did not.

38. That

> ". . . the first step of revocation decision involves retrospect factual question whether parolee had in fact violated one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation."

Gagnon v Scaprelli, at 784, 93 S.Ct., at 1760, quoting Morrissey 408 U.S., at 479-80, 92 S.Ct., 2593.

39. That the spirit of those decessions require that the Missouri Department of Probation & Parole, must find that this petitioner "had in fact violated one or more of the conditions of " this petitioners parole, and, that once the violation has been

"established", (Mo. Rev. Stat. 217.720), by "varified facts", Morrissey, supra, Key 272, should this petitioner be recommitted to prison or should other steps be taken to improve chances of rehabilitation for this petitioner?

40. That this petitioners parole officer had seen fit to recommend "Continuance" of this petitioners parole, (page 3 of exhibit C), but the Missouri Department of Probation & Parole decided to revoke this petitioners parole, without "varified facts", and to recommitte this petitioner to prison without even attempting to improve this petitioners chances of rehabilitation, completly distroying the spirits of both Gagnon & Morrissey, supras.

41. That this petitioner believes that a large part of the parole boards prejudice against this petitioner, was due to the fact that this petitioners parole office had stated in the violation report, (page 3 of exhibit C), that this petitioner was a registered sex offender, and with this petitioner being questioned about the alligation of rape, the parole board conclusively presumed this petitioner to be guilty, and revoked this petitioners parole.

42. That the Supreme Court in Morrissey v Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972), Constitutional Law, Key 272, has stated:

> "What is required by due process for parole revocation is informal hearing structure to assure that finding of parole violation will be based on varified facts . . . U.S.C.A.14;

and the District Court for the Southern District of New York has clearly stated;

> "At parole revocation hearing, burden is on the state to show violation of conditions of parole by preponderance of evidence, . . . "

Johnson v Kelsh, 664 F.Supp. 162 (S.D.N.Y. 1987).

43. That this petitioners parole was not revoked on "varified facts" or by a "preponderance of the evidence", but rather, this petitioners parole was revoked on unsupported hearsey evidence, which violated this petitioners rights under the 5th, 6th and 14th Amendments to the Constitution of the United States.

44. That for the purposes of this court, this petitioner is relying heavely on the decession in State Ex Rel. Mack v Purkett,

825 S.W.2d 851 (Mo.banc 1992), and, IN RE CARSON, 789 S.W.2d 495 (Mo.App.1990), where both of those courts held that the petitioners in those cases, were denied their minimum due precess rights, by not being allowed to confront and cross-examine adverse witnesses, and the Supreme Court for the State of Missouri, in Purkett, supra, page 854, emphised:

> "The court concluded by not being able to confront and cross-examine the person who provided the evidemce, the petitioners due process rights where violated. 789 S.W.2d 497".

45. That not only was this petitioner not allowed to confront and cross-examine this petitioners parole officer, at this petitioners revocation hearing, on September 24, 1992, but this petitioner was "never" told "why" there were no adverse witnesses at this petitioners revocation hearing, and the Supreme Court for the state of Missouri has ststed, in Purket, supra, page 857:

> ". . . the clear requirment of Morrissey (is) that the hearing officer speciffically find good cause for not allowing confratation. Undoubtedly, that requirment must be meet as a precondition to considering purely hearsey statements of persons not subject to confratation . . ."

and for the parole board to not imform this petitioner, at the begining of this petitioners revocation hearing, "why" there were no adverse witnesses at this petitioners revocation hearing, on September 24, 1992, was to deny this petitioner of his minimum due process rights, as described in either, Morrissey v Brewer, 408 U.S. 471, 92 S.Ct. 2593 (1972), and, Gagnon v Scaprelli, 411 U.S. 778, 93 S.Ct. 1756 (1973).

46. That this petitioner was prejudiced, by not being allowed to confront and cross-examine this petitioners parole officer, at this petitioners revocation hearing, on September 24, 1992, in that if this petitioner was able to cross-examine this petitioners parole officer, at this petitioners revocation hearing, then this petitioner could have shown that this petitioners parole officers violation report, exhibit C, was inaccerate and untrue, but without this petitioner being allowed to cross-examine this petit-

ioners parole officer, at this petitioners revocation hearing, on September 24, 1992, the parole board took this petitioners parole officers report, exhibit C, as absolute truth, and this petitioners parole, "liberty", was revoked. Please see exhibit N.

47. That in dealing with the parole boards decission to rely "soley"on the violation report, exhibit C, as the basis for revoking this petitioners parole, the Alabama Criminal Appeals Court has held:

> "But where the only evidence at a revocation hearing was a parole violation report that consisted of information that had in turn been obtained from police reports, the violation reports where held not to have sufficient indicia of reliability. Hill v State, 350 So.2d 716-18 (Ala.Crim.App.1977)", cited from Mack v Purkett, 825 S.W.2d 851, 856 (Mo.banc 1992).

48. That in violating this petitioners parole, the parole board, should not have held the violation report, exhibt C, as having indicia of reliability, as it was unsupported, hearsey, bias, and clearly prejudicial against this petitioner, further, with the Missouri Supreme Court, in Purkett, supra, articulating the use of hearsey evidence, against a parolees right to confront and cross-examine adverse witnesses, through the Missouri Attorney Generals Office, the parole board knew, or should have known, that by revoking this petitioners parole, based"soly"on an unsuported violation report, was to deny this petitioner of his minimum due process rights, as mandated in Morrissey v Brewer, 408 U.S. 471, 92 S.Ct. 2604 (1972), through the decessions that were handed down in Mack v Purkett, 825 S.W.2d 851(Mo.banc1992), and, IN RE CARSON, 789 S.W.2d 495(Mo.App.1990), but the parole board revoked this petitioners parole, anyways.

49. That for the Missouri Department of Probation & Parole, to revoke this petitioners parole, based "soley" on an unsupported violation report, was to revoke this petitioners parole on hearsey evidence, and to deny this petitioner his rights, under the confratation clause, of the 6th Amendment to the Constitution of the United States of America, as the Missouri Court of Appeals has clearly stated:

"Pet. .oners complaint that he w denied the right to confrtation and cross-examination is well founded. Petitioner was entitled to confront and cross-examine the person who provided the evidence which resulted in his loss of liberty. By not being afforded that opportunity, petitioner was denied the minimum rights of due process to which he was entitled."

IN RE CARSON, 789 S.W.2d 495, 497 (Mo.App.1990).

50. That this petitioners revocation hearing, on September 24, 1992, was not unlike the revocations, in either Mack v Purkett, 825 S.W.2d 851(Mo.banc1992) or IN RE CARSON, 789 S.W.2d 495 (Mo.App.1990), where the courts in both those cases adjucated that the petitioners where denied their minimum due process rights, because they were not allowed to confront and cross-examine any adverse witnesses, at their revocation hearings, and with this petitioner not being told why there where no adverse witnesses, and this petitioner not being allowed to confront and cross-examine this petitioners parole officer, at this petitioners revocation hearing, on September 24, 1992, then this court should adjucate that this petitioners minimum due process rights were denied to this petitioner as well.

51. That,

". . . fundamental liberty is valuable and its termination inflicts a grevious loss on the parolee, (and) the court concluded in Morrissey that the decission to revoke parole must be made in comformity with due process standards. 408 U.S., at 482, 92 S.Ct., at 2600"

cited from Gagnon v Scaprelli, 411 U.S. 778, 93 S.Ct. 1756(1973).

52. That by not affording this petitioner with his minimum due process rights, at this petitioners revocation hearing, on September 24, 1992, as mandated in either Morrissey or Scaprelli, supras, and then revoking this patitioners parole, based "soley" on unsupported hearsey evidence, the parole board caused this petitioner to suffer a grevious loss of his "liberty", without due

process of law, in violation of this petitioners federally protected rights, under the 5th, 6th, and 14th Amendments to the Constitution of the United States.

53. That not only was this petitioner denied his minimum due process rights, at this petitioners revocation hearing, on September 24, 1992, but this petitioner was not even provided with a written statement by the factfinders,

"as to the evidence relied on and the reasons for revoking parole."

Morrissey v Brewer, 408 U.S. 471, 92 S.Ct. 2593, 2604 (1972).

54. That even under the rules and regulations of the Missouri Department of Probation & Parole, in this petitioners handbooklet, entitled, "Rights of Alleged Violator to Preliminary and Revocation Hearing", on page (10), of exhibit J, it states:

"After the revocation hearing, the Parole Board will supply the alleged violator with a written notice within ten (10) working days setting out their decision. This notice will be sent within ten (10) working days from the time the decision was made." Please see exhibit J, page 10.

55. That this petitioners exhibits K, L, and M, will show this court, that this petitioner did not recieve within (20) working days, or even one-hundred and twenty (120) days, a decision from the parole board as to the evidence relied on and the reasons for revoking this petitioners parole, in fact, it took this petitioner the grievance procedure of the Missouri Department of Corrections, and, one-hundred and twenty-one days (121), for this petitioner to recieve a written statement from the parole board, as to evidence relied on in revoking this petitioners parole, but to this date, this petitioner has not recieved a written statement from the parole board, as to the reasons for revoking this petitioners parole. Please see exhibits M & N, which this petitioner recieved on or after January 23, 1993; four months and one day, after this petitioners revocation hearing, on September 24, 1992.

56. That the minimum due process requirments of Morrissey or Gagnon, supras, clearly require that this petitioner to be provided, with "a written statement from the factfinders as to the

evidence relied on and reasons for revoking parole, Morrissey, supra, page 2604, and withput this petitioner being provided with a written ststement from the parole board, of the reasons for revoking this petitioners parole, this petitioners minimum due process rights where violated, under the standards as mandated in both Morrissey, and, Scaprelli, supras, and further:

> "There is no place in our system of law for reaching a result of such tremendous consequences without ceremony — without hearing, without effective assistance of counsel, without a ststement of reasons. Kent v United States, 383 U.S. 541, 554, 86 S.Ct. 1045, 1053, 16 L.Ed.2d 84 (1966)"

cited from Morrissey v Brewer, 408 U.S.495, 92 S.Ct. 2593, 2608 (1972).

57. That the spirit of Morrissey, supra, page 2604, is that the entire parole revocation process, should be completed in about two (2) months, as the Supreme Court in Morrissey, supra, has stated:

> "A lapse of two months, . . . would not appear to be unreasonable"

however, from the date in which this petitioner was arrested for alleged parole violation, July 17, 1992, until this petitioner had "finally" recieved a written statement from the parole board, was well over six months, and any time over the two (2) months period, as suggested in Morrissey, supra, should be held to be unreasonable, and in this petitioners situation, a denial of this petitioners minimum due process rights, and esspicailly so, sence this petitioner has still not recieved a written statement from the parole board, for the reasons for revoking this patitioners parole.

58. That without this petitioner recieving a written statement from the parole board, concerning this petitioners revocation hearing, and before this petitioners conditional release date of October 16, 1992, this petitioner "thought" that he still retained his mandate conditional release date, on October 16, 1992, however, what this petitioner found out was, was that this petitioner had lost his conditional release date of October 16, 1992, when this petitioner was brought back to prison and labeled a parole violator.

59. That pursuant with court order and Missouri Laws, this petitioner was sentenced to the Missouri Department of Corrections, on November 8, 1990, for the term of two, 3,3, year sentences, to run concurrently, and with this petitioner being granted jail time, this petitioners sentence start date, was October 17, 1990.

60. That according to Mo. Rev. Stat., 1992, Volume 3, section 558.011:

> 1. The authorized terms of imprisonment, including both prison and conditional release terms, are:
> 4. (1) Asentence of imprisonment for a term of years shall consist of a prison term and a conditional release term. The conditional release term of any term imposed under section 557.036, R.S.Mo., shall be:
> (a) One-third for terms of nine years or less;

61. That this petitioner was sentenced to the Missouri Department of Corrections, for a sentence of three years, and according to Mo. Rev. Stat. 558.011, and for this petitioner to serve one-third of his sentence on conditional release, this petitioner would have had to been released from prison, on October 16, 1992, to serve one-third of this petitioners sentence on conditional release, until this petitioners maximum release date of October 16, 1993.

62. That also according to Mo. Rev. Stat., section 558.11, this petitioners conditional release date of October 16, 1992, could be extended up to this petitioners maximum release date of October 16, 1993, by the board of probation and parole, however, before the board could extend this petitioners conditional release date, under subsection 5, of Mo.Rev. Stat. 558.011, the board must be petitioned :

> Within ten working days of reciept of the petition to extend the conditional release date, the board of probation and parole shall conviene a hearing on the petition. The offender shall be present and may call witnesses in his behalf and cross-examine witnesses appearing against him. . .

63. That this petitioners exhibits J and O will show that under the policies and practices of the Missouri Department of Pro-

bation and Parole, that when an offender is brought back as a parole violator, the inmate is not eligible for conditional release date", and, that this policie of the Missouri Department of Probation and Parole is enforced by the Missouri Department of Corrections, as exhibit O, clearly shows that when an offender is brought back to prison, "C R date is automatically removed". Please see exhibits J, page 11, and exhibit O.

64, That the respondent will surely argue that this petitioners conditional release date of October 16, 1992, was not taken from this petitioner, until after this petitioner had been revoked by the parole board and pursuant with Mo. Rev. Stat. 558.031, subsection 5, which states:

> "If a person released from imprisonment on parole or serving a conditional release term violates any of the conditions of his parole or release, he may be treated as a parole violator under the privisions of section 217.720, RSMo. If the board of probation and parole revokes the parole or conditional release, the paroled person shall serve the remainder of his prison term . . ."

65. That this petitioners exhibits J and O have shown this court, that the policies and practices of the Missouri Department of Probation and Parole, enforced by the Missouri Department of Corrections, is quite differant than what is required in Mo. Rev. Stat. 558.031, subsection 5, as Mo. Rev. Stat. 558.031, subsection 5, calls for an offender to be seen by the parole board and that his release be reviewed, pursuant with section 217.720, R.S. Mo., which requires a hearing in conformity with due process, but exhibits J and O clearly show that an offenders conditional release date is taken from that offender, when the offender is brought back to prison and labeled a parole violator, without any type of a hearing or due process of law.
Please see exhibits J and O.

66. That this petitioners P, is an institutional face sheet on this petitioner, and in the upper left hand corner, it shows that this petitioners face sheet was "updated" on September 23, 1992, by the Missouri Department of Corrections, one (1) day

before this petitioner was seen by the parole board for parole revocation, so the respondents argument that this petitioners conditional release date of October 16, 1992, had not been taken from this petitioner until "after" this petitioners parole had been revoked by the parole board, and, pursuant with Mo. Rev. Stat. 558.031, 5, is moot, as this petitioner was not seen by the parole board for parole revocation, until September 24, 1992. Please see upper left hand corner of exhibit P, and compare the date, to this petitioners actual revocation hearing, on exhibit D.

67. That this petitioners exhibit Q, is an institutional face sheet, for an inmate that was released from confinement, and as this court will notice, that this inmates institutional face sheet, includes umong other things, that inmates conditional release date, pursuant with Mo. Rev. Stat. 558.011, 1, 4, (a), and clearly showing that conditional release dates are included on institutional face sheets, however, this petitioners institutional face sheet, does not show a conditional release date, at least one (1) day before this petitioner had seen the parole board for revocation, and this petitioners exhibit R, is another institutional face sheet on this petitioner, which was updated after this petitioner had seen the parole board, and in both face sheets, there is no mention of a conditional release date. Please see exhibits P and R, before and after revocation.

68. That both Mo. Rev. Stats. 558.011 and 558.031 require and mandate, that some form of a hearing is to be conducted, before this petitioners conditional release date, of October 16, 1992, could have been taken from this petitioner, however, this petitioner has submitted to this court, three (3) exhibits, that show under the policies and practices of both the Missouri Department of Probation and Parole, and, the Missouri Department of Corrections, that without a hearing or due process of law, when an offender is "brought back as a parole violator", his conditional release date, is "automatically removed", and for the two departments to conduct such policied and parctices, is nothing less then a direct violation of both Mo. Rev. Stats. 558.011 and 558.031.

69. That this petitioners conditional release date, of October 16, 1992, was taken from this petitioner, in compliance

with the unlawful policies and practices of both the Missouri Department of Probation and Parole, and, the Missouri Department of Corrections, "before" this petitioner was seen and his parole revoked, by the parole board, without a hearing or due process of law, and in direct violation of this petitioners rights under the 5th and 14th Amendments to the Constitution of the United States.

70. That under the exhaustion doctrine, the respondent will surely argue that this petitioner has not exhausted "all" available administrative and judicial remedies, that where available to this petitioner, before this petitioner sought relief in the Federal Court, by way of the Writ of Habeas Corpus, however, this can easily be resolved.

71. That this petitioners exhibits K and L, will show this court, that under the policies and practices of the Missouri Department of Corrections, that this petitioner is not able to address any issues, concerning the Missouri Department of Probation and Parole, in the grievance procedure of the Missouri Department of Corrections, and as such, administrative remedies are exhausted. Please see the responses on exhibits K and L.

72. That this petitioner has brought his grounds for relief, as stated in this petitioners petition, and herein, to the Circuit Court of Dekalb County, Maysville, Mo. by way of the Writ of Habeas Corpus, under case no. CV592-126CC, and, in a one-sided hearing, without this petitioner or counsel for this petitioner being present, or allowing this petitioner to reply or respond to the respondents response to the courts show cause order, the Circuit Court of Dekalb County, denied this petitioners petition for Writ of Habeas Corpus.

73. That this petitioner then went to the Missouri Court of Appeals, by way of a petition for Writ of Review, Requesting a Writ of Certiorari, case number, 47416, while describing the grounds of relief, as stated in this petitioners petition and herein, because of the one-sided way in which the Circuit Court of Dekalb County, had denied this petitioners his rights under Missouri Rules of Court, as described in paragraph 72, herein, while denying this petitioners petition for Writ of Habeas Corpus, and although the Missouri Court of Appeals had requested from the

respondent to respond to this petitioners petition, on the day after the respondent had filed his response to this petitioners petition, the Missouri Appeals Court, denied this petitioners petition, without affording this petitioner with the oppertunity, to file a reply, response, amendment or suplamental pleading, to the respondents response.

74. That this petitioner then went to the Missouri Supreme Court, case number 75670, by way of the Writ of Habeas Corpus, while describing the ground for relief, in this petitioners petition and herein, but again, this petitioners petition for a Writ of Habeas Corpus was denied, without a show cause order being issued, or, even a reason from the court, as to "why" this petitioner petition had been denied, however, courts have held that the:

> exhaustion requirment satisified when State Supreme Court denied state habeas petition without comment, see, Lewis v Borg, 879 F.2d 697 (9th Cir. 1989); see also, Justices of Boston Municipal Courts v Lydon, 466 U.S. 294, 302-03 (1984); and further:
>
> "Complete exhaustion of State remedies prior to bringing habeas corpus petition was exhausted by special circumstances, including petitioner's continual good-faith effort to bring his petition befors proper form and states officials' failure to take any action to rectify petitioners predicament."see, Chitwood v Dowd, 889 F.2d 781 (8th Cir. 1989).

75. That in fact, this petitioner had filed a complaint under 42 U.S.C. § 1983, asserting the grounds as stated herein, and although this petitioner speciffically stated that he was not seeking reliese, as a form of relief, the Honorable William A. Knox, of the central division, asserted that this petitioner must seek relief in the form of a Writ of Habeas Corpus; case number, 92-4554-CV-C-5, and with all being considered, this petitioner has exhausted administrative and judicial remedies, in a good-faith effort.

76. That this court has the jurisdicition through the Federal Rules of Civil Procedure, to TREAT this petitioners

petition for Writ of Habeas Corpus or this A..ion and Request for Final Disposition of this Matter, under the Federal Rules of Civil Procedure, as a Motion For Summary Judgement, a Judge-on the Merrits, a Judgement on the Pleadings, and possibly a statement of claim, for the purposes of a complaint under 42. U.S.C. § 1983, or any other applicable civil rule that this court can use to best serve justice and this petitioners interests, and although this petitioner might be released on August 7, 1993, for the piuposw of a final adjucation in this matter, courts have held:

> custody requirment satisfied when prisoner released on parole after hebeas petition filed. see, Gordon v Duran, 895 F.2d 610-612 (9th Cir. 1990); see also, Jones v Cunningham, 371 U.S. 236,243 (1963); Kolocotroni v Holcomb, 925 F.2d 278,279-80 (8th Cir. 1991).

77. That this court granted the respondents second request for an extension of time, up to and including July 7, 1993, however, this petitioner did not recieve the respondents response, until five (5) days after the deadline date of this courts order, and that was on, July 12, 1993.

78. That the respondents have submitted into evidence, respondents exhibits 9, 10, and 11, that this petitioner has never seen or had knowlegde of, until this date, July 12, 1993.

79. That the respondents exhibits 9, 10, and 11, is a revocation report, that was filed out and submitted to the parole board, by the institutional parole officer, Peggy McClure, for the purpose of the parole board to review in their final decision to revoke this petitioners parole.

80. That the Revocation Report, Respondents exhibits 9, 10, and 11, is a Revocation Report, that is based on this petitioners parol officers initial violation Report, petitioners exhibit C, and considering that the Respondents exhibits 9, 10, and 11, is a Revocation Report, based "soley" on another Report, Respondents exhibits 9, 10, and 11, is Entirely hearsay evidence that was presented to the parole board, on Septem ber 24, 1992, without this petitioners knowledge of such.

81. That under the minimum due process Requirments in Morrissey v Brewer, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, (1972), this petitioner has a Right to the "disclousure" of "Evidence against" this petitioner, and, a Right to confront and cross-examine adverse witnessess (unless the hearing officer specifically finds good cause for not allowing confrontation), however, Respondents exhibits 9, 10, and 11, was evidence that was submitted to the parole board, at this petitioners Revocation hearing, on September 24, 1992, but this petitioner was not informed, nor was Respondents exhibits 9, 10, and 11, disclosed to this petitioner, at this petitioners Revocation h---inqued to this date, July 12, 1993, this petitioner has not known of the existance of Respondents exhibits 9, 10, and 11, and with the parole board Reviewing Respondents exhibits 9, 10, and 11, prior to revoking this petitioners parole, without disclosing this evidence to this petitioner for rebuttel, this petitioner was denied his minimum due process right, under Morrissey, supra.

82. That on page 2 of Respondents exhibit 10, Peggy McClure had stated that this petitioner had admitted to her, that this petitioner had in fact, used cocaine and advised to her, that this petitioner stated, "so what"; this is pure fabrecation, as this petitioner did not admit to peggy McClure that he had used any type of a drug, let alone cocaine, and, without this petitioner being allowed to confront and cross-examine Peggy McClure, at this petitioners Revocation hearing, on September 24, 1992, this petitioner was denied his right to confrontation and cross examing Peggy McClure, to rebutt any fabrecation that Peggy McClure had submitted to the parole board, and further, Peggy McClure was at F.R.D.C., on the date of this petitioners parole revocation, but this petitioner

was not told by the hearing officer, "why" Peggy McClure was not at this petitioners revocation hearing, on September 24, 1992, and as such, this petitioner was denied his minimum due process rights, under Morrissey, supra,

83. That this petitioner does not want to bring any new grounds up, but with the reciept of the respondents response to this courts show cause order, this is the first time that this petitioner has had "any" knowledge of respondents exhibits 9, 10, and, 11, and, this petitioner is requesting that respondents exhibits 9, 10, and, 11, to be suppressed from the evidence, through the Federal Rules of Civil Procedure, as being hearsay, fabricated and admitted at this petitioners parole revocation hearing, on September 24, 1992, without this petitioners knowledge and in violation of this petitioners minimum due process rights.

84. That in response to the respondents Statement as to Merits, on page (5) of the respondents response, the respondent is asserting that because this petitioner had signed a waiver of his right to a preliminary hearing on the (2) alleged violations of the conditions of this petitioners parole, in petitioners exhibits A and B, that by signing this waiver, this petitioner had made an "admission as to two bases for the arrest", which had, "certainly constitutes probable cause for a more detailed parole revocation proceeding". Please see and interpret respondents response, page 4 and 5.

85. That it is absurd for the respondent to assert that because this petitioner had signed a waiver, that the waiver constitutes an admission of guilt by this petitioner.

86. That for the purposes of a final adjudication of this matter, if this court grants this petitioner petition for Writ of Habeas Corpus and this motion, a liberal construction, See Wallace v Lockhart,

701 F.2d 719, 727 (8th Cir.), cert. denied, 464 U.S. 934 (1983), that if this court finds that this petitioner has asserted new grounds for relief, or has presented different theories that would be totally unexceptable for a pro-se litigant, then this petitioner requests that this court, in the best interest of this petitioner, to dismiss such grounds or theories, but hopefully not to totally disregard them, as this petitioner does not know what he is doing or if it is applicable or not applicable, and further, this petitioner is requesting an immediate evidentuary hearing. So the issues wont become moot.

WHEREFORE, this petitioner prays that this court will take this petitioners best interest to heart, when adjudicating the matters in this motion and/or this petitioners petition for Writ of Habeas Corpus, that if appropiate, to order an evidentiary hearing and/or to appoint this petitioner with legal counsel, for any possible and/or further proceedings in this matter.

Respectfully Submitted by

Randy G. Spencer

Randy G. Spencer, #174948
Western Mo. Corr. Center,
R.R 5. Box 1-E, (C-D-150)
Cameron, Mo. 64429

Certificate of Service

I hereby certify, that a copy of this petitioners exhibits, attached hereto, and, the foregoing, was mailed, postage prepaid, this 13th day of July, 1993, to:

Ronald L. Jergeson, Assistant Attorney General, Penthuse Office Center, 3100 Broadway, Suite 609, Kansas City, Mo. 64111

Randy G. Spencer

Randy G. Spencer PRO-SE

Exhibit A

STATE OF MISSOURI
DEPARTMENT OF CORRE.. ONS
BOARD OF PROBATION AND PAROLE
WARRANT

☐ ENTE.
JUDGE
DOCKET NO
☐ ABSCONDER ☒ NEW OFFENSE ☒ TECHNICAL

TO NAME / TITLE
OR ANY OTHER PEACE OFFICER OF THE STATE OF MISSOURI

ALLEGED VIOLATION OF PROBATION/PAROLE/CONDITIONAL RELEASE/HOUSE ARREST

NAME: SPENCER, Randy G. | NUMBER: IN176948

VIOLATIONS:

Violation of Parole Condition #1, by allegedly committing the crime of Rape.

Violation of Parole Condition #6, by alleged possession and use of crack cocaine.

COPY

AUTHORITY

UNDER THE AUTHORITY GRANTED THE BOARD OF PROBATION AND PAROLE OF THE STATE OF MISSOURI AND ITS PROBATION AND PAROLE OFFICER BY SECTIONS 217.720 RSMo, 217.722 RSMo AND BY ORDER OF THE DIRECTOR OF THE DEPART[illegible]ENT OF CORRECTIONS, YOU ARE HEREBY REQUESTED TO ARREST THE ABOVE NAMED INDIVIDUAL AND HOLD HIM/HER SUBJECT [illegible] THE ORDER OF THE COURT HAVING JURISDICTION IN THIS CASE, THE STATE BOARD OF PROBATION AND PAROLE, OR ITS OFFICER ISSUING THIS WARRANT.

MONTH/DAY/YEAR WARRANT ISSUED	OFFICER NAME AND CODE (TYPE)
July 17, 1992	Jonathan Tintinger 04-07
OFFICE ADDRESS	SIGNATURE OF PROBATION AND PAROLE OFFICER
405 E. 13th St. 5th Fl., Kansas City,Missouri 64106	Jonathan Tintinger

IDENTIFYING INFORMATION

SEX	RACE	BIRTH DATE	AGE	PLACE OF BIRTH	HEIGHT	WEIGHT	BUILD
Male	White	3-31-56	36	Bloomington, IL.	5'11"	180	Stocky

HAIR	EYES	COMPLEXION	IDENTIFYING MARKS
Blonde	Green	Fair	Tattoo on right arm- bowling ball; Upper right arm Randy on a rose

LAST KNOWN ADDRESS	LAST KNOWN EMPLOYER
104 So. Kensington, Kansas City,Missouri	All Seasons Car Wash, 8320 Wornall,K. C.MO.

S.S. NUMBER	FBI NUMBER	P.D. NUMBER
498-62-6752	775895	Alert # 0014239

OFFENSE: BurglaryII; Stealing Over $150.00

WARRANT TO RETURN

COUNTY WARRANT SERVED	DAY/MONTH/YEAR WARRANT SERVED	NAME OF ARRESTEE
COUNTY/CITY JAIL WHERE ARRESTEE BEING HELD		DAY/MONTH/YEAR AVAILABLE FOR TRANSPORTATION
SIGNATURE OF SHERIFF/CHIEF OF POLICE		BY

89

MO 931-0012 (4-90) DO NOT E[illegible]TER INTO MULES OR NCIC MBPP-168 (4-90)

DEPARTMENT [illegible] REQUEST FO... W[illegible]E[illegible] PRELIMINARY HEA[illegible]

INMATE NAME		REGISTER NUMBER	DATE
SPENCER, Randy G.	F	IN176948	7-17-92

I have received a copy of the "Right[illegible] Violator to Preliminary and Revocation Hearing" and fully understand my to a preliminary hearing. I hereby ☐ REQUE[illegible] ☐ WAIVE a preliminary hearing.

SIGNED: Randy Spencer — DATE:

WITNESSED BY: Jonathan Tintinger — DATE: 7-17-92

NOTICE OF PRELIMINARY HEARING

THIS IS TO INFORM YOU, THAT AT YOUR REQU[illegible] HEARING WILL BE HELD ▶ DATE

TIME	LOCATION
THE HEARING OFFICER WILL BE ▶	NAME / TITLE

The purpose of this hearing is to deter[illegible]mine if probable cause or reasonable grounds exist to refer your case to the Mi[illegible] Board of Probation and Parole or to the Cour[illegible] having jurisdiction. This Preliminary hearing is NOT a revocation hearing.

The charges brought against you consist [illegible] following violations of the condition(s) of your parole, [illegible]bation, or condi[illegible] release:

Based on information and evidence plac[illegible]d [illegible]e him, the Hearing Officer will determine if probable cause exists for your to be referred to the authority having jurisdiction.

PROBATION PAROLE OFFICER

ELIGIBLE FOR BOND ▶ DATE

PROBATION PAROLE OFFICER/HEARING OFFICE

MO 931-2123 (5-90) MBPP

90

TOTAL P. 12

RUN DATE 92/09/23
RUN TIME 15:20:56

DEPARTMENT OF CORRECTI[illegible]
ADULT INSTITUTIONS
FACE SHEET

EXHIBIT D

REGISTER NO: 176948 COMMITMENT NAME: SPENCER RANDY G

* * PRESENT CONVICTIONS * *

001
CAUSE NO: CR904834 CLASS: C OCN: MO CODE: 14020990 NCIC: 2299
PG:BURGLARY 2
SENTENCE DATE: 11 08 1990 LENGTH: 003 00 00
SENTENCE COUNTY: JACK RECEIVED: 11 14 1990 JAIL: 0028
SENTENCE START DATE: 10 17 1990 RETURN: 08 25 1992 NON-CREDITED:
MAXIMUM RELEASE: 10 16 1993 MAX: 10 16 1993 DISC TYPE:
CC/CS: REL TO SEQ: SENT STAT: ACTIVE DISC DATE:

002
CAUSE NO: CR904834 CLASS: C OCN: MO CODE: 15010990 NCIC: 2399
PG:STEALING OVER $150.00
SENTENCE DATE: 11 08 1990 LENGTH: 003 00 00
SENTENCE COUNTY: JACK RECEIVED: 11 14 1990 JAIL: 0028
SENTENCE START DATE: 10 17 1990 RETURN: 08 25 1992 NON-CREDITED:
MAXIMUM RELEASE: 10 16 1993 MAX: 10 16 1993 DISC TYPE:
CC/CS: CC REL TO SEQ: 001 SENT STAT: ACTIVE DISC DATE:

Exhibit

The Board Does not allow another inmate PV 8-25-92
to appear as legal Counsel. - [illegible signature]

My name is Randy Spencer #176948
and I am to appear before the board on
9-24-92 and I would like for inmate
David Grahm (para-legal) here at this in-
stitution to be present and my legal counsel
at my hearing.
Please acknowledge receipt of this Thank You.
P.S. Do you know if I have been charged with
a crime?

Sincerely
Randy Spencer

MAIL RECEIVED
SEP 21 1992
INST. PAROLE OFFICE
FRDC

Exhibit K

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
INFORMAL RESOLUTION REQUEST

LOG NUMBER	DATE
12-01-92A-08	11-25-92

INMATE NAME	REGISTER NUMBER	HOUSING UNIT
Randy Spencer	176948	80-247 (B

COMPLAINT: STATE YOUR PROBLEM BRIEFLY.

I seen the parole board for revocation over (60) days ago and I haven't received an answer yet! My orientation handbook, page 10. says "the parole board will supply the alleged violator with a written notice within (10) working days setting out their decision. This notice will be sent within ten (10) working days from the time the decision was made."

I have a right to an answer, regarding the decision of my revocation hearing. I also have been very patient in waiting for a response. However, the board and/or its staff are violating their own rules and policies. in that I was not given an answer within the (30) day time limit, as prescribed in my booklet.

Mr Baker the institutional parole officer, asked me to wait (60) sixty days that is why I've waited so long! But I'm tired of waiting, I deserve an answer I have a right to an answer.

ACTION REQUESTED: STATE REMEDIES YOU ARE SEEKING.

I want a rush effort put into this and I'd like my answer, by the parole board. as to their decision and the evidence or facts relied on

STAFF USE ONLY

FINDINGS:

Your complaint is regarding Probation and Parole. This is a non-grievable issue. You are advised to read and follow IS8-2.1.

RECOMMENDATIONS/RESPONSE

IRR is denied.

INVESTIGATOR'S SIGNATURE: GranAnn Johnson — DATE: 12/10/92
REVIEW SIGNATURE: Dennis S Larsen
RESPONDENT'S SIGNATURE: C Grant Hurley — DATE: 12/10/92 — DATE: 12-14-92
☐ SATISFACTORY ☒ UNSATISFACTORY
INMATE SIGNATURE: Randy Spencer — DATE: 12-15-92

93

Exhibit M

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS AND HUMAN RESOURCES
BOARD OF PROBATION AND PAROLE

Date: 01/22/93

INMATE COPY

SPENCER, Randy
176948
WMCC

I. RELATING TO RELEASE CONSIDERATION

___ 1. You have been scheduled for a parole hearing
___ 2. You have been given parole consideration in a parole hearing

___ 3. You have been scheduled for release from confinement. Actual release depends upon continued record of good conduct and an acceptable release plan. The release decision is:

___ Guideline ___ Below Guideline ___ Above Guideline

The reasons for the action taken are:

II. RELATING TO PAROLE/CONDITIONAL RELEASE VIOLATION

Following your violation hearing on 09/24/92, or your waiver of violation hearing, signed by you on / / .

XXX 1. You have been revoked. Your copy of the Order of revocation is attached.

XXX 2. A total of days will not be counted as time served on your sentence, in accordance with Board decision pursuant to state law. Your New Maximum Release date will be .

You have been scheduled for release from confinement on your Maximum Release date of 10/16/1993.

dlt

94

MBPP 216 (9-85)

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY SPENCER,)
)
Petitioner,)
)
vs.) Case No. 93-0299-CV-W-3-P
)
MIKE KEMNA,)
)
Respondent.)

O R D E R

It is ORDERED that:

(1) petitioner file a reply to respondent's answer, filed July 7, 1993, within thirty (30) days from the date of this Order;

(2) petitioner's failure to do so will result in the dismissal of this case without further notice; and

(3) the Clerk of the Court send petitioner a copy of this Order by regular and certified mail, return receipt requested.

ELMO B. HUNTER
SENIOR DISTRICT JUDGE

Kansas City, Missouri,
Dated: 7-15-93.

ORIGINAL

Document # 16

NOTICE !!! NOTICE !!! NOTICE !!! NOTICE !!! NOTICE !!! NOTICE!

To the Office of the Clerk,
United States District Court
Western District of Missouri
Writ Division,
811 Grand Avenue
Kansas City, Missouri

RE: RANDY G. SPENCER vs. MIKE KEMNA, Case No. 93-0299-CV-W-3-P

That the Court issued an Order, date July 15, 1993 where this petitioner was granted and given (30) days to respond to the respondents answer to the Courts Show Cause Order.

This petitioner is urgently requesting that your office inform the Court that this petitioner has already filed his response and that if the Court waits until the (30) day time limit is up, then this petitioner will be denied his rights through a Writ of Habeas Corpus, as by the time the (30) day time limit of this Courts Order of July 15, 1993 is up, this petitioner will be released and out of prison, therefore, it is absolutly imparative that the Court be informed of this change in this petitioners situation and that he has already filed a response to the respondents answer to the Courts Show Cause Order.

Your time and cooperation in this matter will be greatly appreciated.

Sincerely,
Randy G. Spencer

RANDY G. SPENCER #176948
WESTERN MO. CORR. CTR.
R.R. 5. BOX 1-E
CAMERON, MISSOURI
64429

July 22nd, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KANDY G. SPENCER, Petitioner,

vs.

MIKE KEMNA, Respondent.

Case No.93-0299-CV-W-3-P

PETITIONERS SUPPLAMENTAL RESPONSE TO THIS PETITIONERS MOTION AND REQUEST FOR FINAL DISPOSITION OF THIS MATTER

Comes now, the petitioner, Kandy G. Spencer, pro-se, and in response to tnis Courts Order of July 15, 1993, this petitioner will state as follows:

1. That on July 15, 1993 this Court gave this petitioner (30) days in which to respond to the respondents answer.

2. That this (30) day time limit is unnecessary, as this petitioner has already filed his response to the respondents answer, by certified mail, exhibit A, with a copy being mailed to this court, on July 13, 1993.

3. That this petitioner would like to supplement his already filed response to the respondents answer, by stating that the respondent, in his answer, page number 8, has admitted that there where no live (adverse) witnesses at this petitioners parole revocation hearing, on September 24, 1992.

THEREFORE, this petitioner prays tnat this Honorable Court will supplament this pleading into this petitioners already filed response to the respondents answer to this Courts Show Cause Order and that this Honorable Court will protect this petitioners rights and the eyes of justice, by adjucating this matter as quickly as possible, thereby adjucating a final disposition of this matter.

97

ORIGINAL

Randy G. Spencer

Document # 17

Office of the Clerk
Aug 13, 1993

RE: Randy G. Spencer v Mike Kemna
Case No. 93-0299-CV-W-3-P

This is to inform you that I have had a change of address. My new mailing address is:

Randy G. Spencer
C/o Robert & Linda Smothers
Lot A-15
Terra Linda Trailor Park
Warrensburg, Mo. 64093

Certificate of Service

I Hereby Certify that a copy of the foregoing was mailed, postage pre paid, this 13th day of Aug. 1993, to.
Ronald L. Jergeson, Asst. Attorney Gen. Pentower office Center, 3100 Broadway, Suite 609, Kansas City, Mo.

98

Randy G. Spencer
Randy G. Spencer /#100 52

Document # 19

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY SPENCER,)
)
Petitioner,)
)
vs.) Case No. 93-0299-CV-W-3-P
)
MIKE KEMNA,)
)
Respondent.)

O R D E R

It is **ORDERED** that petitioner's motion for final disposition (Doc. No. 15) is noted. The resolution of this case will not be delayed beyond the requirements of this Court's docket. See United States v. Samples, 897 F.2d 193, 195 (5th Cir. 1990).

ELMO B. HUNTER
SENIOR DISTRICT JUDGE

Kansas City, Missouri,
Dated: 2-3-94.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY SPENCER,)
)
Petitioner,)
)
vs.) Case No. 93-0299-CV-W-3-P
)
MIKE KEMNA,)
)
Respondent.)

ORDER DENYING PETITIONER'S MOTIONS FOR LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS AND FOR A CERTIFICATE OF PROBABLE CAUSE

On August 23, 1995, the court dismissed this habeas corpus case because petitioner is no longer in custody pursuant to the challenged convictions. On September 5, 1995, petitioner filed a notice of appeal and motions for leave to proceed on appeal in forma pauperis and for a certificate of probable cause.

Pursuant to 28 U.S.C. § 1915(a), "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." If the issues sought to be presented are plainly frivolous, the appeal is not taken in good faith. Blackmun, In Forma Pauperis Appeals, 43 F.R.D. 343 (1967).

Furthermore, pursuant to 28 U.S.C. § 2253, "[a]n appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding [unless the judge] issues a certificate of probable cause." A certificate of probable cause will be issued only when substantial questions of law deserving of appellate review are presented. See, e.g., Barefoot v. Estelle, 463 U.S. 880 (1983); Clements v. Wainwright, 648 F.2d 979 (5th Cir. 1981);

Alexander v. Harris, 595 F.2d 87 (2d Cir. 1979).

Because this case presents issues which are not deserving of appellate review, it is ORDERED that petitioner's motions for leave to proceed on appeal in forma pauperis and for a certificate of probable cause are denied.

Elmo B. Hunter

ELMO B. HUNTER
SENIOR DISTRICT JUDGE

Kansas City, Missouri,
Dated: 10-5-95.

No. 95-3629

In The United States Court of Appeals

For the Eighth Circuit

Randy G. Spencer

Appellant

v.

Mike Kemna, et al.

Appellees

Appeal from the United States District Court
for the Western District of Missouri

The Honorable Elmo B. Hunter, Judge

Appellant's Petition for Rehearing, With Suggestions for Rehearing En Banc

David G. Bandre'
Missouri Bar No. 44812
Inglish & Monaco, P.C.
237 East High Street
Jefferson City, MO 65101
Attorney for Appellant

PETITION FOR REHEARING

COMES NOW Appellant, by and through his appointed counsel, David G. Bandre', pursuant to Rules 35(a) and 40(a) of the Eighth Circuit Rules of Appellate Procedure and hereby moves this Court to set aside its August 2, 1996, opinion affirming the District Court's dismissal of Appellant's 28 U.S.C. Section 2254 Petition as Moot. Further, Appellant requests that the Court grant a rehearing thereof, or rehearing en banc because the decision is contrary to prior decision of the Court, because of procedural errors evident in the Court's August 2, 1996, opinion, and because this case presents a question of exceptional importance.

The undersigned counsel expresses a belief, based on a reasoned and studied professional judgment, that the decision is contrary to the decision of the Eighth Circuit Court of Appeals in Leonard v. Nix, 55 F.3d 370 (8th Cir. 1995), and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court.

Further, the undersigned counsel expresses a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:

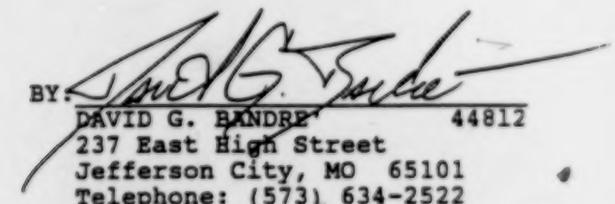
1. Is it the panel's opinion that Appellant's return to custody is irrelevant as to the future consequences of his alleged parole violation which was ruled upon at a Constitutionally flawed parole revocation hearing?

2. Should the three (3) member panel of the United States Court of Appeals for the Eighth Circuit which heard counsel's argument in this matter on May 17, 1996, base their opionion on

only two of the three issues raised by Appellant in his Brief and Reply Brief submitted to this Court in rendering their decision on August 2, 1996, when a ruling on that third issue would result in a different outcome?

3. Did the panel misinterpret Appellant's application of the Public Interest Exception to the mootness doctrine?

INGLISH & MONACO, P.C.

BY: 

DAVID G. BANDRE' 44812
237 East High Street
Jefferson City, MO 65101
Telephone: (573) 634-2522
ATTORNEYS FOR APPELLANT

SUGGESTIONS IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

Randy G. Spencer's parole was revoked following a parole revocation hearing on September 24, 1992. In response to this revocation, Appellant filed an Application for Habeas Corpus Relief under 28 U.S.C. Section 2254 on April 1, 1993. Appellant actively pursued this request for Habeas Corpus Relief and made numerous attempts to have his pleas heard by the United States District Court prior to his release from incarceration. Despite Appellant's best efforts, delays from Appellees lead to his release from incarceration prior to his Petition for Habeas Corpus relies being heard. On August 23, 1995, United States District Court Judge Elmo B. Hunter of the Western District of Missouri, Western Division, dismissed Appellant's case because the sentences at issue had expired and because Petitioner was no longer "in custody" within the meaning of 28 U.S.C. Section 2254(a). On August 2, 1996, a panel of justices of the United States Court of Appeals for the Eighth Circuit issued its opinion, affirming the District Court's dismissal of Appellant's Petition as Moot. In its opinion, the panel failed to comment upon or base any portion of its ruling upon one of Appellant's three major issues raised in his Brief to the panel.

Further, the panel found that there was no "reasonable likelihood that Spencer will again be effected by the Board's parole revocation procedures." The panel further stated that "Assuming that Spencer is paroled from his present incarceration, we will not assume that he will violate his parole terms in order

to again undergo revocation proceedings." This statement by the Court goes against the Court's holding in Leonard v. Nix, 55 F.3d 370 (8th Cir. 1995), and the United States Supreme Court's, statements in Honig v. Doe, 484 U.S. 305 (1988), and mistates the argument raised by Appellant in both his Brief and Oral Argument.

Further, the panel deals with the "capable of repitition yet evading review" exception to the mootness doctrine in its opinion, yet this standard is not the exception offered by Appellant in his Brief or Oral Argument. In fact, Appellant expressly stated in his Reply Brief filed March 27, 1996, that he did not rely on this standard, rather placing support in the public interest exception to the mootness doctrine.

1. **Is it the panel's opinion that Appellant's return to custody is irrelevant as to the future consequences of his alleged parole violation which was ruled upon at a constitutionally flawed parole revocation hearing?**

The panel decision erroneously states that Appellant's collateral consequences are too speculative to overcome a finding of mootness. In Leonard v. Nix, 55 F.3d 370 (8th Cir. 1995) the Court stated that "Leonard's return to custody dispenses with any doubts that remain about the existence of collateral consequences in this case. Upon his return to ISP, Leonard's inmate status is marked by the previous rules violation, and if he commits any further infractions, he faces more severe treatment because of this prior disciplinary action. Accordingly, Leonard's Petition for a Writ Habeous Corpus is not moot, and we deny the Motion to Dismiss on this ground." In the case at bar, Spencer is

similiarly marked by his previous parole revocation, a revocation which should not appear on his record due to the unconstitutional actions that took place at the parole revocation hearing. The panel, in its opinion goes so far as to state that, unlike a criminal conviction, no civil disablities result from a parole violation finding. See Lane v. Williams, 455 U.S. 624, 632 (1982). Even if it is true that civil disabilities do not result from a parole violation finding, which Appellant denies, disabilities within the penal system certainly do exist. Merely because Appellant is an incarcerated person does not mean that he should be subjected to disabilities based upon a flawed parole revocation finding.

The Honorable Justice Heaney, in his concurring opinion went so far as to state that "It seems clear that Spencer may suffer collateral consequences as a result of the revocation of his parole." To conclude otherwise would be to turn a blind eye to Appellant's legitimate claims for relief.

2. Should the three member panel of the United States Court of Appeals for the Eighth Circuit which heard counsel's argument in this matter on May 17, 1996, base their opinion on only two of the three issues raised by Appellant in his Brief and Reply Brief submitted to this Court in rendering their decision on August 2, 1996, when ruling on that third issue would result in a different outcome?

In Appellant's Brief to the Court filed February 8, 1996, Reply Brief filed March 27, 1996, and in Oral Arguments on May 17, 1996, Appellant stressed the contention that his case only

became moot due to the actions of Appellee and the District Court. Those statements made by Appellant in his Brief, Reply Brief and Oral Argument stressed the injustice of these delays which was best summed up by the Supreme Court of the United States in Sibron v. State of New York, 792 U.S. 40, 20 L.Ed.2d 917, 88th S. Ct. (1968) in stating "We do not believe that the Constitution contemplates that people derived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct. . . a state may not effectively deny a convict access to its Appellate Courts until he has been released and then argued that his case has been mooted by its failure to do what it alone prevented him from doing." Id. at 53.

Failure of this Court to review the issue of undue delays resulting in Appellant's Petition for Habeous Corpus relief becoming moot, would clearly be an error.

3. Did the panel misinterpret Appellant's application to the public interest exception to the mootness doctrine?

In its order and opinion filed August 2, 1996, the panel states on pages 6 and 7 that "To be excepted from the mootness doctrine, the matter must be 'capable of repetition yet evading review' and there must be 'a reasonable expectation that the complaining party would be subjected to the same action again.'" Lane, 455 U.S. at 633-34.

While the statement made by the Court is, in and of itself, a true statement, it does not accurately reflect the arguments of Appellants set forth in their Brief, Reply Brief and Oral

Argument.

This issue, after being similarly misinterpreted by Appellee in their Brief to the Court submitted March 7, 1996, was dealt with in Appellant's Reply Brief on page 4, in which Appellant stated that "Even a cursory glance of Appellant's Brief filed February 8, 1996, reveals that Appellant never asserted use of the capable of repetition yet evading review exception. Rather, Appellant relies upon the public interest exception to the mootness doctrine (See Appellant's Brief at page 21-33), which is both directly on point in the case at hand and fully applicable to these facts." See Reply Brief of Appellant at page 4.

Under the public interest exception to the mootness doctrine, Appellant does not have to show a "reasonable likelihood" that he will be affected by the Board's unconstitutional parole revocation procedures in the future. Rather, he need show that an issue is likely to recur though not necessarily to the same individual; that an application of the mootness doctrine can repeatedly frustrate review, and that the issue is one of great public importance. Taylor v. Greenstreet, Inc., 743 P.2d 345 and Junkins v. Branstead, 421 N.W.2d 130. These items have been continually showed by Appellant throughout his attempts to have his Petition for Habeous Corpus relief be declared not moot.

Further, Appellant has established that the controversy, in fact, is capable of repetition and has established that it is reasonably likely that he will be affected by the unconstitutional practices of the parole revocation board

throughout his attempts to gain further parole. The Supreme Court of the United States in Honig v. Doe, 108 S.Ct. 592, 484 U.S. 305, 318 (1988) stated that "Our concern in these cases, as in all others involving potentially moot claims, with whether the controversy was capable of repetition and not . . . whether the claimant had demonstrated that a recurrence of the dispute was more probable than not." Id. at 602, fn 6, (emphasis in original).

The state of the law remains today that the public interest exception to the mootness doctrine is applicable to Appellant and renders his Petition for Habeous Corpus relief not moot.

CONCLUSION

Appellant Randy G. Spencer respectfully requests that Rehearing or Rehearing En Banc be granted and that the panel's opinion of August 2, 1996, be vacated.

INGLISH & MONACO, P.C.

BY: David G. Bandre'

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ATTORNEYS FOR APPELLANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was mailed postage prepaid this 27th day of August, 1996, to Michael J. Spillane and Cassandra K. Dolgin, Attorney General's Office, Supreme Court Building, 207 West High Street, Jefferson City, Missouri 65101.

David G. Bandre'

(11) PP LB

RESPONSE REQUESTED

ORIGINAL

No. 96-7171 (4)

IN THE SUPREME COURT OF THE UNITED STATES

October 1996

RANDY A. SPENCER,

Petitioner,

vs.

MICHAEL L. KEMNA and JEREMIAH W. (JAY) NIXON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
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19 PP

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS "HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS OR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER" BECAUSE A PETITION FOR HABEAS CORPUS CHALLENGING A PAROLE REVOCATION FILED ON APRIL 1, 1993 BECAME MOOT ON AUGUST 7, 1993, WHEN THE PETITIONER WAS RERELEASED ON PAROLE, WITHOUT A DECISION ON THE MERITS BEING ISSUED BY THE DISTRICT COURT, AND THE DISTRICT COURT LATER DENIED THE PETITION AS MOOT ON AUGUST 23, 1995.

II. WHETHER THE DECISION OF THE COURT OF APPEALS THAT A PAROLE REVOCATION CREATES NO COLLATERAL CONSEQUENCES REGARDING FUTURE PAROLE CONSIDERATION UNDER MISSOURI LAW SUFFICIENT TO JUSTIFY HABEAS REVIEWS, IS IN CONFLICT WITH THE DECISIONS OF THE SECOND, SEVENTH AND NINTH CIRCUIT COURTS OF APPEALS.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Table of Statutes

Rules

STATEMENT OF THE CASE

Petitioner, Randy G. Spencer, was convicted of felony stealing and burglary by the Circuit Court of Jackson County, Missouri. On November 18, 1990, he was sentenced to concurrent terms of three years imprisonment for these offenses. Taking into account 28 days of jail time credit petitioner began serving these sentences on October 17, 1990.

Petitioner was paroled from his sentences on April 16, 1992. Petitioner's parole was revoked on September 24, 1992 following a revocation evidentiary hearing. The parole board made the following finding:

> NOW, THEREFORE, after careful consideration of evidence presented, said charges which warrant revocation are sustained, to wit:
>
> #1 - LAWS: I will obey all the federal and state laws, municipal and county ordinances. I will report all arrests to my Probation and Parole Officer within 48 hours.
>
> #6 - DRUGS: I will not have in my possession or use any controlled substance except as prescribed for me by a licensed medical practitioner.
>
> #7 - WEAPONS: I will, if my probation or parole is based on a misdemeanor involving firearms or explosives, or any felony charge, not own, possess, purchase, receive, sell or transport any firearms, ammunition or explosive device or any dangerous weapon as defined by federal, state or municipal laws or ordinances.
>
> **Evidence relied upon for violation is from the Initial Violation Report dated 7-27-92.

The violation report relied on by the parole board indicated that petitioner raped a woman he had met at a crack house using a screwdriver as a weapon and that after his arrest he had admitted using crack on the day of the attack. The violation report indicated that petitioner admitted to the arresting officer that he had pushed the victim in order to get "dope" which she

had in her purse, causing her to fall on the bed and petitioner acknowledged that he may have hit the victim in the head.

The report recommended revocation of parole noting that petitioner had admitted to previously smoking crack cocaine while on parole and to "using anything I can get my hands on." The report also noted that the petitioner was a registered sex offender having previously been convicted of sodomy in 1983 and sentenced to five years in prison. The officer making the report indicated that he felt petitioner was a clear danger to the community.

On April 1, 1993, petitioner filed a federal habeas corpus petition raising four grounds for relief. These grounds are paraphrased below:

> 1) Petitioner was improperly denied a preliminary hearing concerning revocation of his parole;
>
> 2) Petitioner's conditional release date (the date on which he would normally be conditionally released on parole) was moved back without a hearing after his parole violation;
>
> 3) Petitioner's parole revocation hearing was flawed for various reasons;
>
> 4) Petitioner had to wait four months after the hearing to be notified why his parole was revoked even though he believes he should have been notified of the reasons for the denial within twenty days.

On May 3, 1993, the United States District Court ordered respondent to show cause why the writ of habeas corpus should not be granted by June 3, 1993. After receiving two extensions of time totaling five weeks respondent filed a timely response to the show cause order on July 7, 1993.

On August 7, 1993 petitioner was again paroled. On October 16, 1993, petitioner was discharged from parole upon completion of his sentences. On August 23, 1995, the United States District Court dismissed the habeas corpus petition as moot noting that petitioner had been

released on parole approximately four months after he had filed his petition and had completed service of his sentence approximately two months after that. Petitioner filed a notice of appeal on September 5, 1995. The District Court denied a certificate of probable cause on October 5, 1995. On November 16, 1995 the Eighth Circuit Court of Appeals granted a certificate of probable cause to appeal. Petitioner is currently serving an unrelated seven year sentence for attempted felony stealing.

REASONS FOR DENYING THE WRIT

I. THE COURT BELOW DID NOT SO FAR DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS OR SANCTION SUCH A DEPARTURE BY A LOWER COURT AS TO CALL FOR AN EXERCISE OF THE SUPERVISORY POWER OF THIS COURT.

The petitioner alleges that this Court should use its supervisory power to overturn the decision below because the United States District Court granted respondent two extensions totaling five weeks and itself took an excessively long period of time deciding petitioner's case, and as a result petitioner's case became moot or arguably moot. This argument must fail for several reasons. First, the time between filing of the habeas petition on April 1, 1993, and its becoming moot on August 7, 1993, was so short that it was impossible to litigate fully the petition in the District Court and on appeal before it became moot, without radically departing from the accepted and usual course of judicial proceedings. Second, the case was fully litigated within the accepted and usual course of judicial proceedings. Third, petitioner never put the Court below on notice, through a petition for mandamus, that he believed the District Court proceedings were excessively slow and therefore the court below knew of no alleged reason to act to accelerate the District Court proceedings.

(i) The habeas petition was filed on April 1, 1993 and petitioner was released on parole on August 7, 1993 approximately four months later. The petitioner's release on parole was the triggering event for the mootness or arguable mootness of a challenge to parole revocation. See *Watts v. Kentucky*, 757 F.2d 964, 965-966 (8th Cir. 1995) (noting that challenge to parole revocation became moot when the petitioner was reparoled prior to oral argument on appeal). A study by the Bureau of Justice Statistics of the United States Department of Justice indicates

that the mean processing time in federal district courts nationwide for habeas petitions containing more than three grounds is 359 days. United States Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, Federal Habeas Corpus Review, Challenging State Court Criminal Convictions (Discussion Paper); September 1995, NCJ-155504 -- hereinafter Justice Department Report -- at 23.

The Internal Operating Procedures of the Eighth Circuit Court of Appeals provide a standard period of forty days following docketing for an appellant's brief to be filed, an additional thirty days for the appellee's brief, fourteen more days for a reply brief and sixty more days following oral argument for a decision. Eighth Circuit Court of Appeals Internal Operating Procedures Appendix A.

It was impractical to fully litigate petitioner's claim before it became moot within any time frame even resembling the accepted and usual course of judicial proceedings. The allegation that the actions of the District Court and respondent caused mootness is factually wrong. Mootness was inevitable.

(ii) The length of time involved in litigating petitioner's case was not objectively so far outside the accepted and usual course of judicial proceedings as to justify exercise of supervisory authority. Respondent received two extensions totaling five weeks due to the press of business. Review of statistics in the Justice Department Report referenced earlier reveals that Missouri inmates in the period for which data was provided – 1991 – filed thirty-seven federal habeas petitions per one thousand inmates for a total of 582 petitions, making these inmates the most prolific habeas filers per capita in the nation (Justice Department Report at 8). The national average was only fourteen petitions per one thousand inmates (Id.). Bearing in mind the litigious nature of Missouri inmates and the resulting demands on respondent and the District Courts

which must annually analyze hundreds of federal habeas petitions as well as conduct other business, some delay due to the press of business is understandable. Neither the District Court nor respondent acted unreasonably.[1]

(iii) If petitioner believed the District Court allowed his case to be delayed excessively he could and should have filed a mandamus action in the Eighth Circuit Court of Appeals. In that way the petitioner could have given the Eighth Circuit Court of Appeals notice of his complaint. It is inconsistent for petitioner to argue that the court below sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings when an appellant did not inform the supervisory appellate court of the alleged departure. See *Hirsh v. Burke*, 40 F.3d 900, 905 (7th Cir. 1994) (criticizing an appellant for complaining on appeal about a 23 month delay by a district court in issuing an opinion when the petitioner had not filed a mandamus action); *Stewart v. Peters*, 878 F.Supp. 1139, 1141-1142 n.3 (N.D. Ill. 1995) (District Court criticizes a habeas respondent for not filing a mandamus action or otherwise impressing on District Court genuine concern about Court's failure to rule on a petition.

II. THE OPINION OF THE COURT BELOW DOES NOT CONFLICT WITH DECISIONS OF THE SECOND, SEVENTH, AND NINTH CIRCUIT COURTS OF APPEALS SINCE THE OPINION OF THE COURT BELOW IS BASED ON THE

[1]Review of the record from the Court of Appeals below reveals that petitioner asked for and received a three week extension of time for the filing of his brief on appeal and a two week extension of time for the filing of the reply brief. The latter extension was requested by counsel for petitioner "due to a recent influx of cases into my office as well as a generally heavy caseload." Petitioner also asked for and received a two week extension for filing a rehearing motion. *See* Attachments A through D.

It seems inconsistent to argue that respondent may not be permitted five weeks of extensions in the District Court but that seven weeks of extensions are permissible for petitioner in the Court of Appeals.

EFFECT OF A PAROLE REVOCATION ON FUTURE PAROLE CONSIDERATION UNDER MISSOURI'S PAROLE STATUTE.

Petitioner alleges that the opinion of the court below conflicts with opinions from the Second, Seventh and Ninth Circuit Courts of Appeals. Petitioner cites the following cases as conflicting with the decision of the court below: *United States v. Parker*, 952 F.2d 31, 33 (2d Cir. 1991) and *Robbins v. Christianson*, 904 F.2d 492, 495-496 (9th Cir. 1990). Petitioner cites no specific Seventh Circuit case as evidence of the alleged conflict (*See* Petition Table of Cases).

Petitioner's finding of conflict is based on an unnecessarily broad reading of the opinion of the court below. The court below rejected petitioner's argument that the possibility that petitioner's parole revocation would adversely affect a future parole hearing was an adequate collateral consequence to support review under 28 U.S.C. §2254. *Spencer v. Kemna*, 91 F.3d 1114, 1116-1118 (8th Cir. 1996). In reaching its decision the court below noted that "Under Missouri statutes and regulations the Board does not explicitly rely on a parole violation even as one factor in its decision regarding whether to grant parole." Id. at 1117. The court below also noted that Missouri parole regulations explicitly state that a parole violator is eligible to be considered for release on parole. Id. at 1117 n.2.

The decision of the court below was supported by the specific wording of the Missouri parole statute and regulations. The decision can and should be read narrowly as affecting only Missouri cases, since the specific consequence petitioner alleged justified review in federal court -- possible prejudice to future parole consideration -- may be decided on issues of Missouri statutory and regulatory law.

United States v. Parker is not in conflict with the decision of the court below since the *Parker* court found that a probation violation is likely to effect future parole consideration in

New York based on an analysis of New York statutory law. *United States v. Parker*, 952 F.3d at 33. *Robbins v. Christianson* is also not in conflict with the decision of the court below since the *Robbins* court found that a petitioner could challenge prison discipline for drug use because of the collateral consequence of having his discipline for drug use potentially affect his future employment. *Robbins v. Christianson*, 904 F.2d at 496. *Parker* relies on analysis of New York statutory law and is distinguishable on that basis. The holding of the *Robbins* case is based on a collateral consequence -- the effect of a finding of drug use on future employment -- which was not raised or addressed by petitioner in the court below. *Robbins* is distinguishable for that reason.

The court below decided the narrow question presented to it -- i.e. whether petitioner's parole revocation so affected his chances of future parole as to create a collateral consequence sufficient to support federal habeas corpus review of an otherwise moot claim. This question is necessarily married to the specifics of the Missouri parole statute and regulations. There is no conflict with cases from other circuits which found either different collateral consequences justifying federal habeas corpus review or cases which relied on parole statutes of other states to find the potential affect on a future parole justified habeas review.

CONCLUSION

WHEREFORE, for the aforementioned reasons, respondent respectfully prays that petitioner's petition for a writ of certiorari be denied.

Respectfully submitted,

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michael j. spillane

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Attorneys for Respondent

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-3629WMKC

Randy G. Spencer,

Appellant,

vs.

Mike Kemna; Missouri Attorney General,

Appellees.

Appeal from the United States District Court for the Western District of Missouri

The motion of appellant for an extension of time until August 30, 1996 to file a petition for rehearing with suggestion for rehearing en banc is granted.

August 13, 1996

Order entered Under Rule 27B(a):

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Randy Spencer v. Mike Kemna and Jeremiah W. (Jay) Nixon
No. 96-7171
Attachment A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-3629WMKC

Randy G. Spencer

Appellant,

vs.

Mike Kemna, et al.

Appellees.

Appeal from the United States District Court for the Western District of Missouri

Appellant's motion for an extension of time to file the reply brief is granted. Appellant may have to 4/4/96 to file the brief.

March 20, 1996

Order Entered Under Rule 27B(a):

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Randy Spencer v. Mike Kemna & Jeremiah W. (Jay) Nixon
No. 96-7171
Attachment B

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March 15, 1996

Jackie Polk
U.S. Court of Appeals
for the Eighth Circuit
Office of the Clerk
1114 Market St.
St. Louis, MO 63101

Re: Randy G. Spencer v. Mike Kemna, et al.
Case No. 95-3629

Dear Jackie:

As per our telephone conversation of Friday, March 15, 1996, please consider this a formal request for a 14-day continuance to file my Reply Brief in the above-referenced matter. It is my understanding that the Reply Brief is currently due on Thursday, March 21, 1996. As such, I am requesting that the due date be changed to Thursday, April 4, 1996.

The need for this delay is due to a recent influx of cases into my office, as well as a generally heavy case load. I am fearful that an attempt to complete the Reply Brief for Mr. Spencer by March 21, 1996 could have an effect on the final product. Please note that I will attempt to get the Brief filed with you prior to April 4, 1996, if at all possible.

This request for delay is in no way an attempt to hinder or delay the proceedings of this Court.

Thank you for your attention to this matter. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

David G. Bandre'

DGB:aec

cc: Michael J. Spillane,
Asst. Attorney General
Randy G. Spencer

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-3629WMKC

Randy Spencer

Appellant,

vs.

Mike Kemna, et al.

Appellee.

Appeal from the United States District Court for the Western District of Missouri

Appellant's motion for an extension of time to file the brief is granted. Appellant may have until 2/9/96 to file the brief.

January 11, 1996

Order Entered Under Rule 27B(a):

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

Randy Spencer v. Mike Kemna & Jeremiah W. (Jay) Nixon
No. 96-7171
Attachment D

No. 96-7171

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

RANDY G. SPENCER,

Petitioner,

vs.

MICHAEL L. KEMNA and JEREMIAH W. (JAY) NIXON,

Respondents.

CERTIFICATE OF SERVICE

I certify that I am a member of the Bar of this Court, and that on this twelfth day of March, 1997, I deposited in the mails, first-class postage prepaid, a true and correct copy of the within brief in opposition to:

INGLISH & MONACO, P.C.
John William Simon
Counsel of Record
David G. Bandre
237 East High Street
Jefferson City, Missouri 65101

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

Michael J. Spillane

MICHAEL J. SPILLANE
Assistant Attorney General
Counsel of Record

ORIGINAL

(5)

No. 96-7171

IN THE UNITED STATES COURT OF THE UNITED STATES
October Term, 1996

RANDY G. SPENCER,

Petitioner,

ORIGINAL

v.

MICHAEL L. KEMNA and JEREMIAH W. (JAY) NIXON,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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Table of Contents

Table of Authorities

Constitutional Provisions

Statutes

Court Rules

Judicial Decisions

Argument

I. Respondents' brief in opposition fails to justify delaying the petitioner's habeas corpus challenge to his parole revocation until his entire sentence had expired.

In its Rule 15.2, this Court requires respondents' briefs in opposition to "address any perceived misstatements of fact or law set forth in the petition," and "admonish[es]" counsel to do so "in the brief in opposition, and not later."

In their brief in opposition (BIO), the respondents have failed to traverse one after another of the Petition's material propositions of fact or law. Respondents have failed to contest the insufficiency, under the due process clause of the Fourteenth Amendment, of the "evidence" of the parole violations now on the petitioner's record. Petition 3-7 & 11. They have failed to deny their own knowledge of the impending "mootness" of the petitioner's federal claims at the time they delayed his action. Petition 15-16. They have failed to challenge the nationwide importance of the issue of federal reviewability of probation and parole revocations. Petition 20. Petitioner has carried his burden of demonstrating the applicability of Rule 10(a).

A. The failure of the court below even to address the strategic delay of the petitioner's federal habeas corpus action is itself a basis for the exercise of certiorari jurisdiction, as well an admission that the conduct of the district-court proceeding will not bear scrutiny.

Petitioner agrees with the respondents that there is no answer to his argument that the court below "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power" when it refused to address the strategic delay issue in its opinion or in its order denying rehearing. Petition 12-14. Although the respondents make excuses for their own delay and the district court's, they do not even attempt to excuse the Eighth Circuit panel's absolute refusal to acknowledge one of the three points the petitioner briefed and argued. BIO 4-6. When the court with direct supervisory power over a district court will neither defend nor correct a practice such as waiting to rule on a parole revocation claim until the parolee's sentence has expired, he can only look to this Court for relief. Under Rule 15.2, the respondents have conceded this portion of the petitioner's first issue for review.

B. Respondents' generalizations about the length of habeas corpus actions and the "litigious" nature of Missouri prisoners do not excuse their manipulation of federal habeas corpus actions challenging parole revocations so as effectively to deny to the citizens of their state the privilege of the writ of habeas corpus.

As to the remainder of the first point, the respondents cite an extra-record "study" to the effect that "the mean processing time in federal district courts nationwide for habeas petitions containing more than three grounds is 359 days." BIO 4-5. From this "fact," the respondents draw the conclusions that "[i]t was impractical to fully litigate petitioner's claim before it became moot . . . ," and "[m]ootness was inevitable." BIO 5.

Respondents' argument ignores the fact that the bulk of federal habeas corpus petitions are in *no danger* of becoming moot during the time the district courts spend on them. Most federal habeas corpus petitions attack sentences of imprisonment for felonies, in which the petitioner's earliest conceivable release date is well into the next millennium.

Three (3) kinds of federal habeas corpus petitions do *not* fall into this category: those attacking (a) death sentences, (b) extraditions and transfers under the Interstate Agreement on Detainers, and (c) probation and parole revocations. Unlike challenges to sentences of imprisonment, all three of these categories call for disposition in such a manner as will not render the Great Writ a dead letter.

In respect to death sentences, even the respondents would not suggest that a district court should wait until after a petitioner has been executed to consider his petition. In respect to interstate transfers and probation or parole revocations, the respondents' aggregate figures provide no reason

for treating *them* on the same track as petitions challenging sentences of imprisonment—at least where, as here, the petition and the pleadings and correspondence from both sides apprise the district court of relevant time considerations. Whereas a stay can adequately preserve the rights of both parties in the execution and interstate transfer situations, only a swift disposition can do so in the probation or parole revocation situation, because a stay of the petitioner's release would aggravate rather than mitigate the violation of constitutional rights which is at issue.

It is neither "impractical" to dispose of such petitions in less than 359 days, nor "inevitable" that district courts will allow them to become moot. But if this Court agrees with the respondents that the petitioner and other citizens whose parole is revoked less than 359 days before their sentences expire have no right to federal habeas corpus relief for federal constitutional violations in the revocation process, it should say so—in order that these citizens may proceed to an action under 42 U.S.C. § 1983 without running afoul of Preiser v. Rodriguez, 411 U.S. 475 (1973), and without the need to exhaust their state remedies, as this petitioner did. App. 16-18, 39-40 & 83-84.

Respondents contend that the petitioner has somehow *waived* his right to complain about the district court's waiting until he had completed his entire sentence to address his parole revocation claims—and then to do so only by deeming them "moot." BIO 6. According to the respondents, the petitioner should have filed a petition for a writ of mandamus in the Eighth Circuit.

Petitioner filed timely pleadings objecting to both of the respondents' motions for enlargements of time. App. 28-29 & 33-36. When the respondents finally answered the district court's order to show cause—advising the district court that the petitioner was scheduled for re-release one month thence—the petitioner filed a reply that called the district court's attention to the time element the respondents had acknowledged and to the threat that his grievances would be held moot. App. 64-65 & 89. Petitioner wrote the district court's clerk "urgently requesting" him to

inform the district court of the time situation and the risk of mootness. App. 96 (emphasis in the original). It was reasonable for the petitioner to expect that once *both sides* had apprised the district court of the thirty-day window in which it could address his fully-briefed parole revocation claims before he would be re-released, the district court would do so.

Under the respondents' own authority (BIO 6), moreover, the petitioner did not have to use a *specific* vehicle in order to impress the district court with his concern about its failure to rule on his petition. Stewart v. Peters, 878 F.Supp. 1139, 1141-42 n.2 (N.D. Ill. 1995), was a death-penalty case in which the respondent complained that the district court had not denied relief soon enough, but had done nothing to notify the district court that the case was at issue after a remand from the Seventh Circuit. The court listed a mandamus petition as only one option—not even the preferred option—for calling its attention to the post-remand pleadings. It found that the respondent had suffered no prejudice from the delay.

In the instant case, the petitioner apprised the district court of his concern about the timing of the district court's disposition of his case. App. 64-65, 89 & 96. Petitioner suffered prejudice from the delay: he spent additional time in prison on account of an unconstitutional parole revocation, and he still has this official finding of a violent sex crime on his record.

The only defense for treating a habeas corpus petition attacking a probation or parole revocation in the same way that one treats a petition attacking an underlying conviction and sentence is that the petitioner can continue to litigate the revocation if he or she is re-paroled or otherwise released. But that is the very proposition the respondents and the court below deny. Respondents *admit* the petitioner's observation that as legislatures require prisoners to serve ever-increasing portions of their sentences in prison rather than on parole or conditional release, the average length of a parole term is decreasing, and his warning that if this Court allows their position to stand, it will

eviscerate the Fourteenth Amendment due process rights this Court has recognized in Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 776 (1973). Petition 20-21; Rule 15.2.

As a result of the State's violation of his rights, the petitioner has a parole revocation record for forcible rape and armed criminal action based on triple hearsay of a declarant who was voluntarily under the influence of crack cocaine at the time of the "rape" which the intervening declarants say she purported to perceive, recall, and narrate. Petitioner did not waive a preliminary hearing on the most serious element of the alleged parole violation: using a dangerous weapon. App. 67. Respondents attempt to justify their delay and the district court's by citing more extra-record numbers to the effect that Missouri prisoners are "litigious." BIO 5-6. In light of the undisputed facts of this case, it should come as no surprise if Missouri prisoners seek federal relief at a higher rate than those in other jurisdictions. This case illustrates why the Framers sought to guarantee to themselves and their posterity the protection of the Great Writ except in the limited circumstances the Constitution prescribes. U.S. Const. art. I, § 9, cl. 2.

Even if a large number of prisoner petitions are frivolous or otherwise insubstantial, that is no excuse for causing petitions like Randy Spencer's to become moot through no fault of the petitioner. See Haley v. Dormire, 845 F.2d 1498 (8th Cir. 1988)(fact that *same* prisoner had filed fifty previous lawsuits did not justify summary dismissal of eight more).

The time-sensitivity of this petitioner's claims appeared on the face of the petition, as the order to show cause reflected. App. 22. Both he and ultimately the respondents communicated this sensitivity to the district court. Respondents and the district court cannot excuse treating his petition in a manner that they *knew* would deny him the privilege of the writ of habeas corpus by pointing to *other* prisoner's filings.

Respondents complain of the petitioner's *Eighth-Circuit* appointed counsel's having sought extensions of time. BIO 6 n.1. By the time counsel filed these motions, the petitioner had not only been re-paroled on the conviction and sentence giving rise to his original custody; his sentence had completely expired. The damage directly associated with the respondents' and the district courts' delay had already occurred.

To allow a state attorney general's office and a district court to delay a prisoner's challenge to his parole revocation until his entire sentence has expired, then dismiss his claim and defend the dismissal as "moot," is not the "accepted and usual course of judicial proceedings," but a perversion of these proceedings. The court below failed to offer any excuse for the district court's behavior or to give any indication that it would not tolerate such behavior in the future. The judgment must be reversed.

II. Respondents' brief in opposition fails to resolve the conflict between the decision of the court below and the decisions of the Second, Seventh, and Ninth Circuits, because in this case—as in the ones the petitioner cited or alluded to in his petition before this Court—the aggrieved citizens suffered non-speculative, prejudicial collateral consequences as a result of the official acts from which they sought federal habeas corpus relief.

Respondents attempt to avoid the conflict among the circuits that *the court below itself acknowledged* by asserting, without citation, that Missouri's state statutes and regulations on parole do not *require* the Board of Probation and Parole to deny the petitioner *future* parole release because of the unconstitutional revocation for which he sought relief from his country's courts. Respondents even suggest that the Board will not take this revocation into account in making any future release decision relating to the petitioner. In making these assertions, the respondents ignore all collateral

consequences *except* future *parole release* decisions by the *Missouri* Board of Probation and Parole. BIO 7. But that is not the law.

A. Under Missouri and federal law, the collateral consequences of the petitioner's unconstitutional parole revocation are not speculative, but gravely prejudicial.

Petitioner's outstanding parole revocation for forcible rape and armed criminal action exposes him to enhanced sentences for a wide variety of crimes, as well as to impeachment whenever he is called as a witness in a civil or criminal matter. These prejudicial collateral consequences flow from well-established rules of Missouri law and of federal law to the extent it is observed in Missouri.

Under subsection 4 of Mo. Rev. Stat. § 558.018 (Supp. 1996), a court of the State of Missouri "shall" sentence a citizen to life imprisonment *with* eligibility for parole but *without* eligibility for *discharge* from parole if it finds that he is a "predatory sexual offender." It provides that forcible rape is one of the prior offenses for such a finding. Subsection 5 defines a "predatory sexual offender" to include a person who "[h]as previously committed an action which would constitute an offense listed in subsection 4 of this section, whether or not the act resulted in a conviction." (Emphasis supplied.) As a quasi-judicial finding of guilt of forcible rape, the parole revocation Randy Spencer has suffered would therefore give the prosecution a prima facie case for subjecting him to a sentence of life imprisonment without eligiblity for discharge from parole if he were were accused of any of the offenses listed in subsection 4. These include attempted statutory rape, for which the sentence would otherwise be ten to twenty years.[1]

[1]Mo. Rev. Stat. § 557.021.3(1)(a)(1994)(classification of substantive offense), § 564.011.3(1)(1994)(attempts), and § 566.032 (Supp. 1996)(defining and punishing substantive offense).

The Missouri Supreme Court has allowed the prosecution to adduce evidence of a parole violation to prove a "substantial history of serious assaultive criminal convictions" in the penalty phase of a capital trial. State v. Nave, 694 S.W. 2d 729, 738 (Mo. 1985)(en banc), cert. denied, 475 U.S. 1098 (1986). Under Nave, such "evidence" would be admissible to negate the statutory mitigating circumstance of the absence of a "significant history of prior criminal conduct." Mo. Rev. Stat. § 565.032.3 (1994).

Under Missouri law an opponent may use a probation or parole violation to impeach a witness—including the defendant in a criminal trial.[2] Under Missouri law, as under the Federal Rules of Evidence, a finding of a parole violation for forcible rape and armed criminal action would be admissible to prove "character or a trait of character" where it is "an essential element of a charge, claim, or defense."[3] It would provide a good-faith basis for asking a reputation witness whether he or she was aware that the petitioner had had his parole revoked for forcible rape and armed criminal action.[4]

State probation or parole revocations "count" under the Federal Sentencing Guidelines. E.g., United States v. Renfrew, 957 F.2d 525, 526 (8th Cir. 1991). In assessing a defendant's criminal

[2]State v. Comstock, 647 S.W. 2d 163, 164-66 (Mo. Ct. App. 1983)(probation violation), distinguishing State v. Newman, 568 S.W. 2d 276, 278-82 (Mo. Ct. App. 1978)(disapproving impeachment on parole violation as part of questioning about details of prior crimes and bad acts other than fact and basis of parole violation).

[3]Fed. R. Evid. 405(b); Durbin v. Cassalo, 321 S.W.2d 23, 25-26 (Mo. Ct. App. 1959)(collecting cases not even involving quasi-judicial finding).

[4]Fed. R. Evid. 405(a); State v. Sweet, 796 S.W.2d 607, 614 (Mo. 1990)(en banc), cert. denied, 499 U.S. 1019 (1991).

history, federal courts may consider allegations of uncharged conduct that is not even criminal, and of criminal conduct concerning which the court or the prosecution dismissed the relevant counts.[5]

When a federal court finds that actual convictions do not adequately reflect the seriousness of a defendant's criminal history, the Sentencing Guidelines authorize an upward departure on the basis of "prior similar misconduct established by a civil adjudication or by a failure to comply with administrative orders." U.S.S.G. § 4A1.3.[6] Petitioner's parole revocation would certainly be offered under the Guidelines.

As a matter of Missouri law, Randy Spencer cannot prevent the Board's revocation of his parole from coming back to affect his legal rights. If he is accused of *attempting* to have *consensual* sex with a thirteen-year-old, he is exposed to life imprisonment on account of the unconstitutional parole revocation for which the lower courts have refused to provide him a day in court. If he is accused of first-degree murder, the prosecution can use it as evidence on the basis of which he could be sentenced to death.

On the other hand, if the petitioner leads a blameless life, but is the victim of a crime or tort, the wrongdoer can—in a broad variety of circumstances—introduce this parole revocation to discourage a jury from vindicating the petitioner's rights as an honest citizen. It requires no "speculation" to arrive at either set of conclusions: it is the law.

B. United States v. Parker demonstrates that the decision of the court below conflicts with a decision of the Second Circuit.

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[5]U.S.S.G. § 1B1.4; United States v. Snover, 900 F.2d 1207, 109-10 (8th Cir. 1990), citing United States v. Williams, 879 F.2d 454, 457 (8th Cir. 1989).

[6]See United States v. DeFilippis, 950 F.2d 444, 447-49 (7th Cir. 1991)("wealth of information" about uncharged conduct in presentence report); United States v. Keys, 859 F.2d 983, 989-91 (10th Cir. 1990)(prison disciplinary report).

Respondents seek to distinguish United States v. Parker, 952 F.2d 31 (2d Cir. 1991)(per curiam), by arguing that the Second Circuit relied on "New York statutory law" in finding that Parker's federal probation violation was "likely to effect future parole consideration." BIO 7-8. As the petitioner has pointed out (at 7-9 of this reply), under Missouri law and federal law, his unconstitutional parole revocation is admissible to his substantial prejudice in various civil and criminal proceedings. Petitioner may have occasion to travel to New York or some other state where a past parole revocation from another jurisdiction would have even more damaging effects on his legal rights than this one has in Missouri.

More fundamentally, *before* the Parker court *reached* the specific collateral consequences the prisoner faced under *New York* state law, it rejected the Government's argument that Lane v. Williams, 455 U.S. 624 (1982), precluded it from reaching the merits of her case. It discussed decisions from the Fifth, Seventh, Ninth, and District of Columbia Circuits applying Lane, and concluded that they had viewed as "dispositive" the distinction between attacking only one's sentence, on the one hand, and attacking either the underlying conviction or the probation or parole violation, on the other. Parker, 952 F.2d at 33, citing D.S.A. v. Circuit Court Branch 1, 942 F.2d 1143 (7th Cir. 1991); Robbins v. Christensen, 904 F.2d 492 (9th Cir. 1990); United States v. Spawr Optical Research, Inc., 864 F.2d 1467 (9th Cir. 1988), cert. denied, 493 U.S. 809 (1989); United States v. Maldonado, 735 F.2d 809 (5th Cir. 1984); and United States v. Cooper, 725 F.2d 756 (D.C. Cir. 1984)(per curiam).

In Parker the Government appeared to have interpreted dictum in a footnote to an Illinois case that this Court cited in Lane, 455 U.S. at 632 & n.13, to mean that a record of parole violations cannot be a collateral consequence for the purpose of mootness inquiries. The Second Circuit replied:

> In cases where a convict directly attacks his or her conviction or finding of parole violation, courts have, as a general rule, considered a wider spectrum of collateral effects in deciding whether a case is moot. Thus, potentially negative effects on testimonial credibility, future bail adjustments, future criminal sentences, and potential employment discrimination have been found sufficiently injurious to sustain the vitality of a controversy.

952 F.2d at 33 (emphasis supplied), citing D.S.A., 942 F.2d at 1148-50; Robbins, 904 F.2d at 494-95; and Maldonado, 735 F.2d at 812-13. Finding that the federal parole violation in question was "likely to influence the state parole authority to [the prisoner's] detriment," the Second Circuit held that her claim was not moot, and addressed the merits of her attack on the violation. Id. at 33-34.

Respondents do not argue that this Court should deny relief under Lane v. Williams. BIO v & 7-8. Like the petitioner's in Parker, this petitioner's case is fundamentally distinguishable from it. In Lane, two (2) Illinois prisoners, Williams and Southall, sought to challenge their *underlying sentences* based on pleas of guilty; their intervening release on parole, revocation, return to custody, re-parole, and complete discharge from custody were *collateral* to their attack on the voluntariness of their pleas. This Court recognized this distinguishing fact when it said: "[Williams and Southall] have never attacked, on either substantive or procedural grounds, the finding that they violated the terms of their parole." 455 U.S. at 633.

Unlike the prisoners in Lane, Randy Spencer does not question the legitimacy of the term of parole supervision to which the State of Missouri subjected him. Instead, he maintains that when the State of Missouri has revoked his parole in violation of the Constitution of the United States, and when he has exhausted his state-court remedies for the State's constitutional violations, he has a right to a judicial remedy in the courts of the United States.

Respondents cannot reconcile Parker with the decision of the court below. If that court had either applied the Second Circuit's reading of Lane or engaged in a realistic appraisal of the effect of

this parole revocation on *this* petitioner's ability to protect himself against private wrongs or public accusations, it would have reversed the district court's dismissal as moot.

C. Robbins v. Christianson demonstrates that the decision of the court below conflicts with a decision of the Ninth Circuit.

Respondents attempt to avoid the conflict between the Eighth Circuit's decision in the petitioner's case and the Ninth Circuit's in Robbins by purporting to "distinguish" it because the collateral consequence involved in Robbins—"the effect of a finding of drug use on future employment"—was "not raised or addressed by petitioner in the court below." BIO 8. Like their response to Parker, this effort is insubstantial, and the conflict among the circuits stands.

Robbins involved a prison disciplinary proceeding in which federal corrections officials gave Robbins a conduct violation, transferred him from a halfway house to a prison camp, and denied him sixty (60) days of good-time credit on the basis of a single urine sample they believed to show the use of illegal drugs. They failed to provide him a copy of the conduct violation report until the time to seek administrative review had expired. Robbins filed a federal habeas corpus action, and while the action was pending, he completed the sentence for tax evasion he had been serving at the time of the urine test. The district court dismissed his action as moot. 904 F.2d at 493-94.

The Ninth Circuit held that this Court's holding in Lane did not apply because Robbins was attacking the disciplinary action rather than his underlying conviction or sentence. 904 F.2d at 494-95. Only after reaching this conclusion of law—diametrically opposed to the Eighth Circuit's on the same point in the instant case—did it consider what collateral consequences would keep a claim alive once a person's sentence has expired.

The Ninth Circuit discussed, first, the effect of an official finding of illegal drug use on the petitioner's sentencing exposure if he were charged with a federal drug offense. It cited the Federal

Sentencing Guidelines as "permit[ting] a court to impose more restricted sentences and release conditions on those defendants who have histories of substance abuse." U.S.S.G. § 5B1.4(b)(23) & § 5H1.4. It noted the upward departure that U.S.S.G. § 4A1.3(c) permits on the basis of "prior civil adjudications or a defendant's failure to comply with administrative orders." It noted that a prison disciplinary record could be the basis for such a finding. 904 F.2d at 495, citing United States v. Keys, 899 F.2d 983, 989-90 (10th Cir. 1990).

In Evitts v. Lucey, 469 U.S. 387, 391 n.4 (1985), this Court held that a habeas corpus attack on a criminal conviction did not become moot on the expiration of the sentence challenged, because of the threats that a petitioner's conviction will be used "to impeach testimony he might give in a future proceeding" and "to subject him to persistent felony offender prosecution." Relying on Evitts, the Ninth Circuit reasoned that it was better to examine the petitioner's grievance sooner rather than later. 904 F.2d at 495-96, citing Sibron v. New York, 392 U.S. 40, 56 (1968).

Only after having developed a sufficient basis for reversing the district court did the Ninth Circuit discuss the petitioner's second collateral consequence, relating to employment opportunities. In a single paragraph, the Ninth Circuit held that it "could not fully discount" this risk. It then returned to the general odium attached to illegal drug use—a factor equally applicable to impeachment, sentencing, and employment. 904 F.2d at 496.

Consequently, Robbins stands foursquare in conflict with the opinion of the court below. Like Parker, D.S.A., and the cases they cite, it rejects the notion that Lane bars federal habeas corpus consideration of an official finding of wrongdoing other than a criminal conviction if the subject of the finding is no longer in prison pursuant to the finding he or she seeks to attack. Respondents cannot avoid the conflict by pointing to a single paragraph in the Robbins opinion or by niggling about the fact that the Eighth Circuit itself, rather than the petitioner, was the first to cite it.

D. D.S.A. v. Circuit Court Branch 1 demonstrates that the decision of the court below conflicts with a decision of the Seventh Circuit.

Respondents point out that the petitioner's *question and argument heading* refer to the Seventh Circuit as well as the Second and the Ninth. BIO 7. In the leading case that canvasses the conflicting decisions on this question, D.S.A. v. Circuit Court Branch 1, 942 F.2d 1143 (7th Cir. 1991), the Seventh Circuit explains that under this Court's decisions such as Evitts v. Lucey, the existence of an official act other than a conviction of crime imputing guilt to a citizen is a sufficient collateral consequence to defeat a claim of mootness. Id. at 1148-49. The Seventh Circuit cited several opinions from the Fourth, Ninth, Tenth, and Eleventh Circuits citing both sentence-enhancement and impeachment uses of convictions as overcoming the defense of mootness. 942 F.2d at 1149 n.9.[7]

Like the instant case, D.S.A. did not involve a conviction of crime: whereas this case involves a parole revocation for forcible rape, armed criminal action, and possession of crack cocaine, D.S.A. involved a Wisconsin juvenile adjudication that an eleven-year-old had participated in the murder of a nine-year-old. In D.S.A., the Seventh Circuit took account of the gravity of the conduct. 942 F.2d at 1149-50.

Even when one limits one's view to Missouri law, one must agree that the Board of Probation and Parole's finding that the petitioner had committed forcible rape and armed criminal action would have both of the collateral consequences on which the Seventh Circuit focussed in holding D.S.A.'s habeas corpus petition to present a live claim. It also noted that under Wisconsin law, the juvenile

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[7]Citing White v. White, 925 F.2d 287, 290 (9th Cir. 1991); Sanchez v. Mondragon, 858 F.2d 1462, 1463 n.1 (10th Cir. 1988); Broughton v. North Carolina, 717 F.2d 147, 149 (4th Cir. 1983); Malloy v. Purvis, 681 F.2d 736, 740 (11th Cir. 1982)(Wisdom, J.), quoting Harrison v. Indiana, 597 F.2d 115, 118 (7th Cir. 1979).

adjudication "could be used in a presentence report to increase a subsequent sentence." 942 F.2d at 1150. In Missouri, it is the Board of Probation and Parole staff that *prepares* presentence investigation reports. Mo. Rev. Stat. § 217.760 (1994). The law is not so naïve as to expect this staff to omit the violation report from which this petitioner seeks redress.

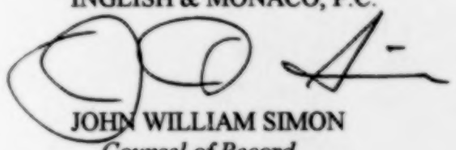
D.S.A. is not merely a citation for another circuit with which the court below is in conflict; it provides powerful reasons why this Court should resolve the conflict in the petitioner's favor. The judgment must be reversed.

Conclusion

WHEREFORE, the petitioner renews his prayer that the Court grant the pending petition; reverse the judgment of the court below; and remand with directions to remand to the district court for the purpose of granting the writ and ordering the Board of Probation and Parole to expunge the petitioner's record of the violation of his parole by committing forcible rape, armed criminal action, and possession of a controlled substance.

Respectfully submitted,

INGLISH & MONACO, P.C.



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No. 96-7171
IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

RANDY G. SPENCER,

Petitioner,

v.

MICHAEL L. KEMNA and JEREMIAH W. (JAY) NIXON,

Respondents.

CERTIFICATE OF SERVICE

I certify that I am a member of the Bar of this Court, and that on this nineteenth day of March, 1997, I deposited in the mails, first-class postage prepaid, a true and correct copy of the within reply brief in support of petition to counsel of record for both respondents, as follows:

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Respectfully submitted,

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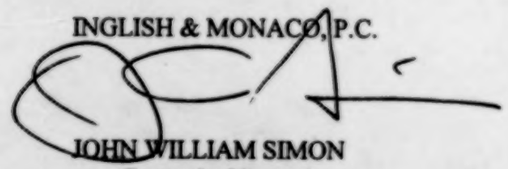

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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Certiorari Granted April 14, 1997

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

RELEVANT DOCKET ENTRIES

April 1, 1993	Petition for Writ of Habeas Corpus
April 1, 1993	Referral to Pro Se Office
May 3, 1993	Order to Show Cause Why Writ of Habeas Corpus Should Not Be Granted
June 1, 1993	Respondents' Motion for Extension of Time
June 3, 1993	Order Granting Respondents' Motion for Extension of Time
June 8, 1993	Petitioner's Objections to Respondents' Motion for Extension of Time
June 23, 1993	Respondents' Motion for Additional Extension of Time
June 23, 1993	Entry of Appearance of Assistant Attorney General Jurgeson as Counsel for Respondents
June 30, 1993	Petitioner's Suggestions in Opposition to Respondents' Motion for Additional Extension of Time
June 30, 1993	Order Granting Respondents' Motion for Additional Extension of Time
June 7, 1993	Respondents' Response to Show Cause Why Writ of Habeas Corpus Should Not Be Granted
July 13, 1993	Second Order Granting Respondents' Motion for Additional Extension of Time

July 14, 1993	Petitioner's Motion for Final Disposition
July 15, 1993	Order Directing Petitioner to File Reply to Respondents' Response to Show Cause
July 22, 1993	Letter from Petitioner to District Court Explaining that his Motion for Final Disposition Contained his Reply
July 26, 1993	Petitioner's Supplement to Motion for Final Disposition
August 13, 1993	Petitioner's Notice of Change of Address, Reflecting Re-Release on Parole
February 3, 1994	Order Taking Under Advisement Petitioner's Motion for Final Disposition
August 23, 1995	Order Dismissing Case as Moot
September 5, 1995	Notice of Appeal
October 5, 1995	District Court's Order Denying Motion for Leave to Proceed in Forma Pauperis and for Certificate of Probable Cause
October 24, 1995	Application for Certificate of Probable Cause from United States Court of Appeals
November 16, 1995	Order of Court of Appeals Granting Certificate of Probable Cause and Appointing Counsel
November 16, 1995	Briefing Schedule

December 1, 1995	Entry of Appearance of Counsel for Petitioner
December 11, 1995	Petitioners' Designation of the Record
January 11, 1996	Petitioner's Motion for Enlargement of Time to File Brief
January 11, 1996	Order Granting Petitioner's Motion for Enlargement of Time to File Brief
January 30, 1996	Receipt of Record by Court of Appeals from District Court
February 8, 1996	Brief of Petitioner-Appellant
March 8, 1996	Brief of Respondents-Appellees
March 18, 1996	Petitioner's Motion for Extension of Time to File Reply Brief
March 20, 1996	Order of Court of Appeals Granting Petitioner's Motion for Enlargement of Time to File Reply Brief
March 27, 1996	Reply Brief of Petitioner-Appellee
April 29, 1996	Entry of Appearance of Assistant Attorney General Dolgin as Counsel for Respondents
April 30, 1996	Respondents' First Citation Pursuant to Fed. R. App. P. 28(j)
May 3, 1996	Respondents' Second Citation Pursuant to Fed. R. App. P. 28(j)
May 17, 1996	Oral Argument
August 2, 1996	Opinion of Court of Appeals

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

PERSONS IN STATE CUSTODY APPLICATION FOR HABEAS CORPUS UNDER 28 U.S.C. SECTION 2254

(Filed Apr. 1, 1993)

Name: Randy G. Spencer

Prison Number: #176948

Place of Confinement: W.M.C.C., R.R. 5., Box 1-E, Cameron, Mo. (illegible)

United States District Court Western District of Missouri

Case No: _____ (to be supplied by Clerk of the U. S. District Court)

Randy G. Spencer PETITIONER
(Your Full Name)

v.

Mike Kemna, Supt., W.M.C.C. RESPONDENT
(Name of Warden, Superintendent, Jailer, or authorized person having custody of petitioner.)

and

THE ATTORNEY GENERAL OF THE STATE OF Missouri
_____ ADDITIONAL RESPONDENT.

(If petitioner is attacking a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack,

petitioner should file a motion under 28 U.S.C. Section 2255, in the federal court which entered the judgment.)

Instructions – Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as a basis for prosecution and conviction for perjury. All questions must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorities need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee you may request permission to proceed in forma pauperis, in which event you must execute the declaration on the last page, setting forth information establishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the original and two copies must be mailed to the Clerk of the United States District Court whose address is Office of the Clerk United States District Court, 811 Grand Ave., Kansas City Mo.

(8) Petitions which do not conform to these instructions will be returned with notation as to the deficiency.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Missouri Dept. of Prob. & Parole, Jefferson City, Missouri

2. Date of judgment of conviction: September 24, 1992, parole revoked

3. Length of sentence: the remainder of my current sentence

4. Nature of offense involved (all counts): Violation of State Laws, Use of Drugs and Posession [sic] of a deadly weapon

5. What was your plea? (Check one)

   (a) Not Guilty XXXXX

   (b) Guilty _____

   (c) Nolo Contendere _____

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details:

_____

_____

_____

_____

6. Kind of trial: (Check One) (a) Jury _____ (b) Judge only Parole Bd.

7. Did you testify at the trial? Yes [XX] No [ ]

8. Did you appeal from the judgment of conviction? Yes [XX] No [ ]

9. If you did appeal, answer the following:

   (a) Name of court: Circuit Court of Dekalb, Co, Mo.

   (b) Result: Petition for Writ of Habeas Corpus denied

   (c) Date of result: January 28, 1993

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, Rule 27.26 motions or other motions with respect to this judgment in any court, state or federal?

    Yes [XX] No [ ]

11. If your answer to 10 was "yes," give the following information:

    (a) (1) Name of court: Mo. Court of Appeals, K.C., Mo.

   (2) Nature of proceeding: Writ of Review: request for Writ of Certuarior [sic] #47416

   (3) Grounds raised: Denied Preliminary Hearing on all alleged parole violations, Mo. mandate Conditional Release Date was taken from me without a hearing. Denied right to a representative of my choice at my revocation hearing, to confront-cross examine witness

   (4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes [ ] No [XX]

   (5) Result: _____

   (6) Date of result: _____

(b) As to any second petition, application or motion give the same information:

   (1) Name of court: continued from above #11

   (2) Nature of proceeding: _____

   (3) Grounds raised: was not told by parole board at my revocation hearing why there where [sic] no live witnesses no evidence other then [sic] the parole violation report, that I denied all alligations [sic] of parole violation, that I was revoked at an unfair and bias parole hearing

   (4) Did you receive an evidentiary hearing on your petition application, or motion? Yes [ ] No [XX]

   (5) Result: Writ of Review; request for Certuarior [sic]

   (6) Date of result: denied on February 17, 1993

(c) As to any third petition, application or motion, give the same information:

(1) Name of court: Missouri Supreme Court

(2) Nature of proceeding: Petition For Writ of Habeas Corpus case no. 75670

(3) Grounds raised: same as above except that I included that I was denied my right to an [sic] statement and the facts relied upon by the parole board, as to why my parole was revoked.

(4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes [ ] No [XX]

(5) Result: petition for Writ of Habeas Corpus,

(6) Date of result: denied on March 23, 1993

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes [XX] No [ ]

(2) Second petition, etc. Yes [XX] No [ ]

(3) Third petition, etc. Yes [XX] No [ ]

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain why you did not:

_____

_____

_____

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may

attach pages stating additional grounds and *facts* supporting same.

> CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on which you based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search or seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: Denied my right to a preliminary hearing on all alleged parole violations

Supporting FACTS (tell your story *briefly* without citing cases or law):

When I was originally violated, my parole officer violated my parole on (2) counts and a waived a hearing on these alleged violations, however, after I was in the Co. Jail a couple of weeks, my parole officer brought me a copy of the violation report and it had a third alleged parole violation on it and I did not sign a waiver on the third

B. Ground two: My Prison Conditional Release Date of Oct. 16, 1992 was taken from me without a hearing

Supporting FACTS (tell your story *briefly* without citing cases or law):

Under Mo. Law I was to have a conditional release date of October 16, 1992 and although Mo. Law requires a hearing to be conducted before my C.R. date could be taken from from [sic] me, when I was returned to the Mo. Dept. of Corr. F.R.D.C., I was labeled a Parole Violator and as a policy and practice, my C.R. date was taken automatically and without a hearing before I was revoked by the parole board

C. Ground three: My entire parole revocation hearing was Constitutionally Flawed and in violation of my due process right

Supporting FACTS (tell your story *briefly* without citing cases or law):

I was denied my right to a representative of my choice at my revocation hearing, counsel, to cross examine and to confront any adverse witnesses, I was not told at the hearing why there where [sic] no live witnesses, there was no evidence at my hearing but the violation report (hearsey [sic]), that I was found guilty of Parole Violation based solely on violation illegible

D. Ground four: That I was denied my right to a statement of the facts and the evidence relied on for parole revocation

Supporting FACTS (tell your story *briefly* without citing cases or law):

That I seen the parole board on September 23, 1992 and the policies of the Mo. Dept. of Probation and Parole states that I would be supplied with an answer withen [sic] (20) days, however, I had to wait four months and then to get an answer on why my parole was violated, I had to file an illegible grievance and then I find out that the parole board violated my parole, base [sic] solely on the violation report.

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them:

I have not brang [sic] this up as I couldnt until now, but the courts that I have been through have not allowed me to rebute or to otherwise answer the respondents answers to my petitions, I file them and then they are denied.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes [ ] No [XX]

15. Give the name and address, if known, of each attorney who represented you in the following states of the judgment attacked herein:

(a) At preliminary hearing No attorney has been appointed or represented me through my entire legal process, on parole violation

(b) At arraignment and plea _____

(c) At trial _____

(d) At sentencing _____

(e) On appeal _____

(f) In any post-conviction proceeding _____

(g) On appeal from any adverse ruling in a post-conviction proceeding. _____

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time?

Yes [XX] No [ ] three alleged parole violations

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes [ ] No [XX]

(a) If so, give name and location of court which imposed sentence to be served in the future:

(b) And give date and length of sentence to be served in the future:

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes [ ] No [XX]

Wherefore, petitioner prays that the Court grant petitioner relief to which petitioner may be entitled in this proceeding.

/s/ myself Randy G. Spencer
Signature of attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that foregoing is true and correct. Executed on March 26 1993
(date)

/s/ Randy G. Spencer
Signature of petitioner

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER,	)	
	)	
Petitioner,	)	Case No. 93-0299-CV-W-3-P
vs.	)	
	)	
MIKE KEMNA,	)	(Filed May 13, 1993)
	)	
Respondent.	)	

ORDER DIRECTING RESPONDENT TO FILE AN ANSWER

Petitioner, who is incarcerated at the Western Missouri Correctional Center in Cameron, Missouri, has filed *pro se* this petition for a writ of habeas corpus under 28 U.S.C. § 2254. He has paid the $5.00 filing fee required by 28 U.S.C. § 1914(a).

Petitioner challenges the revocation of his parole. He lists the following grounds for relief: (1) he was denied the right to a preliminary hearing concerning alleged parole violations; (2) his conditional release date was suspended without a hearing; (3) his parole revocation hearing was constitutionally flawed and did not comport with the principles of due process; and (4) he was denied the opportunity to review the evidence relied on in revoking his parole.

Granting petitioner's claims a liberal construction, *see Haines v. Kerner*, 404 U.S. 519 (1972), they do not appear to be frivolous or malicious.

Accordingly it is **ORDERED** that respondent answer the petition within thirty (30) days from the date of this

Order, and show cause why the relief sought should not be granted.

/s/ Elmo B. Hunter
ELMO B. HUNTER
UNITED STATES DISTRICT COURT

Kansas City, Missouri

Dated: 5-3-'93.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER, Petitioner,	)	No. 93-0299-CV-W-3-P
v.	)	
MIKE KEMNA, Respondent.	)	(Filed Jun. 1, 1993)

MOTION FOR EXTENSION OF TIME

Comes now respondent, by and through counsel, and states as follows in support of his motion for an extension of time in which to file his response to this court's order to show cause why a writ of habeas corpus should not be granted.

1. That respondent's response in the above-styled cause is due on or before June 2, 1993.

2. That counsel has, within the past weeks, filed numerous responses in federal habeas corpus cases, written and filed numerous briefs, and prepared for and made several oral arguments in the various courts in the State of Missouri. Due to this litigation, respondent has been delayed in the completion of his brief in the above-styled cause.

3. That the request for an extension is not designed to vex, harass or infringe in any way upon the substantive rights of appellant.

WHEREFORE, for the reasons herein stated, respondent prays this court grant his motion for an extension of

time for twenty-one (21) days, up to and including June 23, 1993.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

/s/ Frank A. Jung
FRANK A. JUNG
Assistant Attorney General

P. O. Box 899
Jefferson City, MO 65102
(314) 751-3321

Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER, Petitioner,	)	No. 93-0299-CV-W-3-P
v.	)	
MIKE KEMNA, Respondent.	)	(Filed Jun. 3, 1993)

ORDER

Upon motion of respondent, and for good cause shown, it is ORDERED that respondent is granted an extension of time of twenty-one (21) days, up to and including June 23, 1993, to respond to this Court's Order to show cause.

/s/ Elmo B. Hunter
UNITED STATES DISTRICT JUDGE

Dated: 6-3-'93

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER,	)	
Petitioner,	)	Case No. 93-0299-CV-W-3-P
-vs-	)	
MIKE KEMNA,	)	
Respondent.	)	

MOTION OF OBJECTION

Comes now, the petitioner, Randy G. Spencer, a pro-se litigant, and in objection too [sic] the respondents request for an extension of time, this petitioner will state as follows:

1. That the respondents motion for an extension of time, in the above entitled cause of action, is a *sham plea* motion and should be denied.

2. In fact, the respondents very first statement, in paragraph #1, *is false information to this court*, as the respondents response to this courts show cause order, is not due on or before June 2, 1993 as the respondent has stated, but rather, the respondents response to this courts show cause order is not due until June 13, 1993, a difference of eleven days from the sham date that the respondent has based his request for an extension of time on, however, when this court considers the respondents request for an extension of time, the "Timeliness of motions must be determined by tables in effect when motion was filed". See, *Bailey v. Sharp*, 782 F.2d 1366, appeal after remand, 811 F.2d 366 (Ind. 1986).

3. The fact is, this court ordered the respondent to respond to this courts show cause order, within (30) days of the date of said order, date being May 13, 1993, however, the respondents attorney has waited (20) days of this (30) day time limit, before requesting an extension of time and even then, it appears that he only done it because he thought he was out of time.

4. Another fact is, the respondents attorney should have been more responsible and forseen that a delay in the respondents response to this courts show cause order was possible, but it is appearent [sic] that the respondents attorney had placed this courts show cause order on the back burner, and, that he had taken his so called other litigation, more seriously, but when he felt that he was out of time, the respondents attorney file [sic] a motion for an extension of time, based on false date and lame excuses, taking it for granted that this court would grant the respondents request for an extension of time, however, "Courts have inherent power to inforce [sic] compliance with lawful order entered be [sic] them", See, *In re Esposito*, 119 B.R. 305 (Bkrtcy. M.D.Fla. 1990), esspicailly [sic] so, when a request has been made to alter this courts order, without a rational, viabel [sic] reason for such a request.

5. That the respondents attorney should have requested an extension of time, at a much earlier date, then [sic] what he thought was a last minute effort to keep from violating this courts show cause order, deadline date, and this type of negligance [sic] by the respondents attorney, should not be tollerated [sic].

6. That the *excuse* of the respondents attorney being delayed in giving a response to this courts show cause order, because of *other* litigation, is just that, an excuse, and this petitioners freedom, along with this courts show cause order, should not have been *put off* because of such an *excuse*, as it is appearent [sic] that this courts show cause order and this petitioners freedom, was not treated equally, nor given the same respect or concern as *other* litigation.

7. Furthermore, the respondents attorney has presented to this court, a false certificate of service with the respondents motion and request for an extension of time, as the respondents attorney has certified that the respondents motion was mailed to this petitioner on May 31; 1993, however, *this would be impossible*, as May 31, 1993 was a Federal Holiday and the [sic] was *NO* U.S. Postale [sic] Service on that day, either picking up or delivering, furthermore, this petitioner recieved [sic] his copy of the respondents request for an extension of time, on June 1, 1993, making it impossible for this petitioner to get 24 hour mail service, when there wasn't any mail service in the first place.

8. That this petitioner has shown to this court, that in the respondents very first pleading to this court, that the respondents attorney has presented (2) two, seperate [sic] and distinct, lies and falsities to this court, and that any further pleadings from the respondent and/or his attorney, should be viewed with great care and skeptism, esepicailly [sic] when this court has to adjucate [sic] this petitioners constitutionally flawed parole revocation hearing and this petitioners illegal incarceration, which is being justified by the respondent and his attorney.

THEREFORE, this petitioner prays that this honorable court will deny the respondents motion and request for an extension of time, and, that the respondent will be ordered to respond to this courts show cause order, by the deadline date of said order.

RESPECTFULLY SUBMITTED BY,

/s/ Randy G. Spencer
Randy G. Spencer #176948
W.M.C.C./R.R. 5. Box 1-E
Cameron, Missouri-64429

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed, by U.S. Mail, postage pre-paid, this 4th day of June, 1993, to:

Frank A. Jung
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri
65102

/s/ Randy G. Spencer
Randy G. Spencer #176948

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER,	)	
	)	
Petitioner,	)	No. 93-0299-CV-W-3-P
	)	
vs.	)	
	)	(Filed Jun. 23, 1993)
MIKE KEMNA,	)	
	)	
Respondent.	)	

RESPONDENT'S MOTION FOR ENLARGEMENT OF TIME IN WHICH TO FILE RESPONSE

COMES NOW respondent, by and through counsel, Jeremiah W. "Jay" Nixon, Attorney General of the State of Missouri, and Ronald L. Jurgeson, Assistant Attorney General, and states as follows in support of his motion for extension of time in which to respond:

1. That respondent's response in the above-styled cause is currently due on or before June 23, 1993;

2. That counsel has, within the past weeks, filed numerous responses in federal habeas corpus cases, and has written and filed numerous briefs in the Eighth Circuit Court of Appeals and has prepared for and made several oral arguments in the Eighth Circuit. Due to this litigation, respondent has been unable to complete the response in the above-styled case;

3. That this requested extension in not designed to vex or harass petitioner. Petitioner's substantive rights should not be adversely affected.

WHEREFORE, for the reasons stated above, respondent requests an extension of time of fourteen (14) days, up to and including July 7, 1993, in which to respond in the above-styled cause.

Respectfully Submitted,

JEREMIAH W. "JAY" NIXON
Attorney General

/s/ Ronald L. Jurgeson
RONALD L. JURGESON
Assistant Attorney General
Missouri Bar No. 35431

Penntower Office Center
3100 Broadway, Suite 609
Kansas City, Missouri 64111
(816) 889-5000
(816) 889-5006 FAX

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 23rd day of June, 1993, to:

Randy G. Spencer
Reg. No. 176948
Western Missouri Correctional Center
Route 5, Box 1-E
Cameron, Missouri 64429

/s/ Ronald L. Jurgeson
RONALD L. JURGESON
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER, Petitioner,	)	No. 93-0299-CV-W-3-P
vs.	)	
MIKE KEMNA, Respondent.	)	(Filed Jun. 23, 1993)

ENTRY OF APPEARANCE

COMES NOW Ronald L. Jurgeson, Assistant Missouri Attorney General, and enters his appearance on behalf of respondent.

Respectfully Submitted,

JEREMIAH W. "JAY" NIXON
Attorney General

/s/ Ronald L. Jurgeson
RONALD L. JURGESON
Assistant Attorney General
Missouri Bar No. 35431

Penntower Office Center
3100 Broadway, Suite 609
Kansas City, Missouri 64111
(816) 889-5000
(816) 889-5006 FAX

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 23rd day of June, 1993, to:

Randy G. Spencer
Reg. No. 176948
Western Missouri Correctional Center
Route 5, Box 1-E
Cameron, Missouri 64429

/s/ Ronald L. Jurgeson
RONALD L. JURGESON
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER, Petitioner,	)	Case No. 93-0299-CV-W-3-P
vs.	)	
MIKE KEMNA, Respondent.	)	(Filed Jun. 30, 1993)

PETITIONERS' OBJECTION TO THE RESPONDENTS "SECOND REQUEST" FOR AN EXTENSION OF TIME

Comes now, the petitioner, Randy G. Spencer, pro-se, and in objection to the respondents' *second request* for an extension of time, this petitioner will state as follows:

1. That on June 2, 1993, a Mr. Frank A. Jung, entered into these pleadings as the respondents attorney.

2. That when Mr. Jung had entered into these proceedings, as the respondents attorney, Mr. Jung had requested an extension of time, up to and including June 23, 1993, a period of (3) weeks, in which to make and file a response for the respondent, to this courts show cause order of May 13, 1993, and, Mr. Jung had made his request for an extension of time, on what *he thought* was the last possible day in which to do so; June 2, 1993, however, and in reality, Mr. Jung still had eleven (11) days of the original show cause order time, to make and file a response to this courts show cause order and that such a response was not due until June 13, 1993.

3. That when a court considers a motion for an extension of time, it has wide discreation [sic] to grant or

to deny such a motion, F.R.C.P., rule 6(b), however, requests are usually granted on a showing of good cause, *Creedon v Taubman*, 8 F.R.D. 268 (D,C.Ohio 1947); and presuambly [sic] with the understanding, that the time that is to be granted, will be time spent on purposes for which the time was requested.

4. That on June 23, 1993, the day in which Mr. Jung was to have filed a response to this courts show cause order, for the respondent, instead of a response to this courts show cause order being filed, a Mr. Ronald L. Jergeson enters into these pleadings, as the respondents attorney, and he too requests from this court, an extension of time.

5. That this petitioner is objecting to the respondents *second request* for an extension of time, by Mr. Ronald L. Jergeson, for the following reasons:

A. That Mr. Frank A. Jung had entered into these pleadings, as the respondents' attorney, on June 2, 1993.

B. That Mr. Jung had requested (3) weeks in which to make and file a response to this courts show cause order, for the respondent, because "other litigation" was causing undue delays, and an extension of time was needed.

C. That when granting his request for an extension of time, and, with this court granting his request, Mr. Jung had intered [sic] into an understanding with this court, that when he was granted his request, that a response for this courts show cause order, of May 13, 1993, would be made and filed

on June 23, 1993, the day that Mr. Jung had indicated that he would be done.

D. That when granting Mr. Jung his request for an extension of time, a "new" show cause order deadline date came into effect; deadline date being June 23, 1993, and, on this date, Mr. Jung and the respondent where faced with filing a response to this courts show cause order, or to wait past the deadline date of June 23, 1993, and file a motion for an extension of time, claiming excusable neglect, or for Mr. Jung to file a motion of withdraw, in this case, which would require a granting by this court, or, for both the respondent and Mr. Jung to violate this courts order of June 3, 1993, by not filing a response to this courts show cause order, on June 23, 1993.

E. That it appears that Mr. Jung had wasted the time that was granted to hime [sic] in this courts order of June 3, 1993, and that this courts order of June 3, 1993 had been violated, as on June 23, 1993, Mr. Jung, not the respondent has filed a response to this courts show cause order.

F. That Mr. Jung or the respondent have not filed a late motion for an extension of time, claiming excusable neglect.

G. That Mr. Jung has not filed a motion for withdraw in this case, nor has this court granted such" motion, releaving [sic] Mr. Jung of his responsibilities, to the respondent or this court.

H. That without being relieved of their responsibilities, and, without filing a response to

this courts show cause order of May 13, 1993, on June 23, 1993, Mr. Jung and the respondent have violated this courts order of June 3, 1993.

6. That on June 23, 1993, when Mr, Ronald L. Jergeson made his appearence [sic], for the respondent and as his attorney, that such an appearence [sic] should not and does not satisfy this courts order of June 3, 1993, that a response to this courts show cause order, *was due* on June 23, 1993, not an entry of appearance, by an attorney.

7. That when Ronald L. Jergeson had made his appearance, and, instead of requesting an extension of time, because this petitioners case had just been transferred to him, and that he was unprepaired [sic] and unable to file a response to this courts show cause order, or that a response was forthcoming and that an extension of time was needed to finish the response up, from the documents and materials that Mr. Jung had sent him; Mr. Ronald L. Jergeson requested an extension of time, *based on the exact same set of reasons and excuses*, that Mr. Jung had used.

8. That it appears that Mr. Jergeson has assertained [sic], that sence [sic] the reasons and excuses that Mr. Jung had used, had worked, that he too would use them.

9. That a question of "truthfullness" must be drawn, *when Mr. Jergeson had used the exact same set of reasons and excuses*, that Mr. Jung had used, in making his request for an extension of time, as a request for an extension of time cannot show good cause, if it is based on lies, or *uniform* application.

10. Further, both of the attornies [sic] in this case, for the respondent, have claimed that their motions for an extension of time, where [sic] not designed to vex, harass, or to infring [sic] on this petitioners substantive rights, and, they further state that such a request for an extension of time, is necessary, because of *"other litigation,"* which has caused them to be unable or delayed to file a response to this courts show cause order.

11. That if the respondents requests for an extension of time, where [sic] not designed to vex the litigation of this case, and this petitioners substantive rights, then why have both of the attornies [sic] in this case, for the respondent, waited until the day in which the response to the show cause order was due, and then make their appearence [sic] and request for an extension of time.

12. The attorneies [sic] for the respondent, are not stupid, and they could have or would have know ahead of time, that *"other litigation"*, could possibly cause them to be delayed in their response to this courts show cause order, for the respondent, but instead of the respondents attornies forseeing [sic] any possibly [sic] delays, or making their appearance at the earliest possible moment, and making their request for an extension of time, *then*, they *both waited* until the day in which the response to this courts show cause order was due, befor [sic] making their appearence [sic] and requesting an extension of time, *denying this petitioner*, the opportunity and ability to file a motion of objection to their requests for extensions of time, until *after* this court has granted their requests.

13. That the respondents requests for an extension of time, *are designed to VEX*, harass, and to infringe on this petitioners substantive rights.

THEREFORE, this petitioner prays that this court will deny the respondents "second request" for an extension of time, and to require that Mr. Frank A. Jung, make and file a response to this courts show cause order, like he was granted time in which to do so, that this court put a stop to the vexation of this case, by the respondents attornies [sic], and that if this courts grants the respondents "second request" for an extension of time, that this court make sure that it is the last extension of time, at this point in these proceedings, and, for this court to take what ever other actions, that it deems just and fair.

Respectfully Submitted by,

/s/ Randy G. Spencer
RANDY G. SPENCER/
Petitioner

CERTIFICATE OF SERVICE

I hereby certify, that a copy of the foregoing has been mailed, postage pre-paid, on this 25th day of June, 1993, to:

Ronald L. Jergeson, Pentower [sic] Office Building, 3100 Broadway, Suite 609, Kansas City, Missouri-64111-attorney for the respondent.

/s/ Randy G. Spencer
RANDY G. SPENCER/
Petitioner

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER, Petitioner,	)	
vs.	)	No. 93-0299-CV-W-3-P
MIKE KEMNA, Respondent.	)	(Filed Jun. 30, 1993)

ORDER

Upon motion of respondent, and for good cause shown, it is ORDERED that respondent is granted an enlargement of time up to and including July 7, 1993, in which to file a response to the petitioner's petition as directed by this Court's order to show cause.

IT IS SO ORDERED.

/s/ Elmo B. Hunter
ELMO B. HUNTER
UNITED STATES
DISTRICT JUDGE

Kansas City, Missouri,
Dated: 6-30-'93.

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

RANDY SPENCER, Petitioner,	)	
vs.	)	No. 93-0299-CV-W-3-P
MIKE KEMNA, Respondent.	)	(Filed Jul. 7, 1993)

**RESPONSE TO ORDER TO SHOW CAUSE
WHY A WRIT OF HABEAS CORPUS
SHOULD NOT BE GRANTED**

COMES NOW respondent, by and through counsel, and states as follows in response to this Court's order to show cause why a writ of habeas corpus should not be granted.

STATEMENT OF CUSTODY AND PARTIES

Named petitioner, Randy Spencer, is presently incarcerated at the Western Missouri Correctional Center located in Cameron, Missouri, pursuant to the judgment and sentence of the Circuit Court of Jackson County, Missouri. Petitioner was convicted, after a plea of guilty, of burglary in the second degree and stealing over $150. Petitioner received concurrent terms of three years imprisonment upon his convictions. Petitioner has yet to complete serving his present terms of imprisonment.[1]

---

[1] Records from the Missouri Division of Probation and Parole indicate that petitioner has been scheduled for parole

Mike Kemna, Superintendent of the Western Missouri Correctional Center, is petitioner's custodian and is a proper party respondent. 28 U.S.C. §2254, Rule 2(a).

STATEMENT OF EXHIBITS

1. Attached hereto are true and correct copies of documents relating to petitioner's parole and subsequent parole revocation regarding his Jackson County charges; said documents are incorporated by reference herein, and identified as Respondent's Exhibit A.

STATEMENT OF ISSUES AND EXHAUSTION

In the present petition, petitioner has presented what he characterizes as four allegations for review by this Court. Paraphrased from petitioner's petition and this Court's order of May 3, 1993, those four allegations are as follows:

(1) That petitioner was denied the right to a preliminary hearing concerning his parole violation;

(2) That petitioner's conditional release date was suspended without a hearing;

(3) That petitioner's parole revocation hearing was constitutionally flawed and did not

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release on August 7, 1993. This presumptive release date is, of course, based upon continued acceptable behavior in the Missouri Department of Corrections until that time. The exhibits also indicate that petitioner will complete the service of his entire term of imprisonment on October 16, 1993 (Resp.Exh.A, p. 1).

comport with the principles of due process; and

(4) That petitioner was denied the opportunity to review the evidence relied on in revoking his parole.

(Pet. at pp. 6-7).

Examination of the petition together with the above-listed exhibits indicates that petitioner, for the purpose of 28 U.S.C. Section 2254, has exhausted his claims because he has either fairly presented the claims to the Missouri state courts or because he is procedurally barred from presenting certain claims in that he has not given the Missouri state courts the opportunity to review the claims. ***Wainwright v. Sykes,*** 433 U.S. 72, 87, 97 S.Ct. 2497, 2506, 53 L.Ed.2d 594 (1977). The posture of the specific claims will be discussed *infra.*

If it appears during the course of this habeas litigation that petitioner has different theories to support his present claims, then those claims may not be exhausted. This is also true if petitioner has new grounds which he would like to assert. Consideration in state court and federal court of these claims in [sic] procedurally barred. ***Day v. State,*** 770 S.W.2d 692 (Mo. banc), *cert. denied sub nom.* ***Walker v. Missouri,*** 493 U.S. 866 (1989); ***Byrd v. Armontrout,*** 686 F.Supp. 743, 753 (E.D.Mo. 1988), *aff'd,* 880 F.2d 1 (8th Cir. 1989), *cert. denied,* 110 S.Ct. 1326 (1990). Respondent informs this Court and warns petitioner that if he attempts to litigate new claims in a future petition for a writ of habeas corpus, the State of Missouri will vigorously oppose that later litigation as being an abuse of the writ. *See,* 28 U.S.C. Section 2254, Rule 9(b).

McCleskey v. Zant, ___ U.S. ___, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); *Smith v. Armontrout*, 888 F.2d 530, 539-541 (8th Cir. 1989), *stay denied*, 110 S.Ct. 830 (1990).

Respondent is concerned about the implication of footnote one of the decision by the United States Court of Appeals for the Eighth Circuit in *Wade v. Armontrout*, 798 F.2d 304, 306, n.1 (8th Cir. 1986). Respondent requests that if this Court allows petitioner to amend his petition to include new claims, that respondent be allowed an opportunity to discuss the exhaustion or non-exhaustion of those claims.

STATEMENT AS TO MERITS

I.

In his first allegation, petitioner asserts that he was denied his right to a preliminary hearing at the time he was notified of his parole violations (Pet. at p. 6). Petitioner asserts that at the time he was arrested as a parole violator he was informed of two counts forming the basis of the violation warrant (Pet. at p. 6). Petitioner admits that with respect to at least two of the bases for the arrest warrant, he waived a preliminary hearing (Pet. at p. 6). It is only with a third basis for the arrest that petitioner now takes exception. Petitioner asserts that he had not waived a preliminary hearing with respect to the third cause for arrest.

To be sure, the United States Supreme Court has noted the importance of a preliminary hearing at the time of arrest with respect to parole violators. *Morrissey v. Brewer*, 408 U.S. 471, 484-487, 92 S.Ct. 2593, 2602-2603, 33

L.Ed.2d 484 (1972). In *Morrissey*, the Supreme Court noted that "due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available." *Id.*, at 485, 92 S.Ct. at 2602. With respect to the preliminary hearing, the Court stated the purpose as determining "whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." *Id.*

Here, petitioner's own statement in the petition before this Court would be sufficient to indicate that the purpose of the preliminary hearing was satisfied through acts of petitioner himself. Petitioner's admission as to two bases for the arrest certainly constitutes probable cause for a more detailed parole revocation proceeding. Accordingly, even if petitioner disagreed with the third and final foundation for his arrest, probable cause still existed through acts admitted to by petitioner. On this basis, petitioner's Ground I should be denied.

Additionally, the record developed during petitioner's parole revocation process indicates that petitioner waived a preliminary hearing (Resp.Exh.A, pp. 9, 17). Petitioner has offered no specific evidence to demonstrate that the preliminary hearing was not waived at the time of the arrest and preparation of the original violation report. As petitioner bears the burden of proof in a federal habeas corpus action, his claim under Ground I must be denied.

II.

Next, as his second allegaition [sic], petitioner asserts that he has somehow been deprived of a constitutional protection because his conditional release date was taken from him without a hearing (Pet. at p. 6). In the supporting facts relating to this ground, petitioner asserts that he had originally received a conditional release date of October 16, 1992 (Pet. at p. 6). Petitioner then asserts that Missouri law requires a hearing prior to the extension of a conditional release date (Pet. at p. 6). Petitioner's allegation should be denied for the reasons in petitioner's petition itself.

The issue presented by petitioner in Ground II is only an issue of state law best left for determination by the state courts. ***Estelle v. McGuire,*** ___ U.S. ___, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

In this case, petitioner received a maximum sentence date of October 16, 1993 (Resp.Exh.A, pp. 1, 4, 6, 9, 11). Petitioner's maximum sentence date had remained unaffected by his parole violation (Resp.Exh.A, pp. 4, 6). As there is no constitutional right to conditional release and as petitioner has not had his maximum sentence date extended based upon his parole violation, there is no basis for Ground II. This ground should be denied.

III-IV.

As his remaining two allegations, petitioner argues that he has been deprived of various rights – including the right to due process – during his parole revocation hearing before the Missouri Board of Probation and

Parole (Pet. at p. 7). Again, much like petitioner's Ground I, the assertions presented to this Court in Grounds III and IV find their constitutional foundation in the Supreme Court case of ***Morrissey v. Brewer, supra.*** In ***Morrissey,*** the United States Supreme Court determined that, under the Fourteenth Amendment, a parole violator must be given an opportunity for a revocation hearing prior to the final decision of revocation being made. ***Morrissey v. Brewer,*** 408 U.S. at 487-490, 92 S.Ct. at 2603-2604.

In deciding the ***Morrissey*** case, the High Court outlined the basic protections to be afforded an alleged violator.

> This hearing must be the basis for more than determining probable cause; it must lead to a final evaluation of contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation. The revocation hearing must be tendered within a reasonable time after the parolee is taken into custody. A lapse of two months, as respondents suggest occurs in some cases, would not appear to be unreasonable.

Morrissey v. Brewer, 408 U.S. at 488, 92 S.Ct. at 2603-2604.

Here, it certainly appears petitioner has been afforded all process due under the circumstances. After the origional [sic] violation report was filed (Resp.Exh.A, pp. 17-19), and after the revocation report was filed (Resp.Exh.A, pp. 9-11), petitioner signed a document

specifically requesting a revocation hearing (Resp.Exh.A, p. 8). By letter dated September 14, 1992, petitioner was informed that a revocation hearing would be conducted on September 24, 1992 at 9:00 a.m. (Resp.Exh.A, p. 7). Petitioner acknowledged receiving a copy of the Board of Probation and Parole letter (Resp.Exh.A, p. 7).

On September 24, 1992, a parole revocation hearing was conducted, giving petitioner an opportunity to answer the charges of a violation of his parole release (Resp.Exh.A, pp. 4-5, 6). Based upon the evidence presented in the initial violation report dated July 27, 1992, the Board of Probation and Parole determined that petitioner's parole should be revoked based upon violation of three conditions of parole, conditions number 1, number 6 and number 7 (Resp.Exh.A, p. 6). Remembering that petitioner admitted the use of crack cocaine the night of the alleged parole violation, and coupling that with the fact petitioner acknowledged sexual intercourse with the purported victim of the rape, there was no need for the Missouri Board of Probation and Parole to present live witnesses at the revocation hearing. Accordingly, there were no adverse witnesses for petitioner to confront or cross-examine.

A sufficient basis existed for the revocation of petitioner's parole and as petitioner has not been denied due process, there is no merit to his contentions in Ground III or IV.

Additionally, in Ground IV, petitioner seems to argue that the Missouri Board of Probation and Parole did not provide answer as to the revocation until approximately four months after the hearing in September of 1992. As

demonstrated by the order of revocation (Resp.Exh.A, p. 6), petitioner's parole was ordered revoked on September 24, 1992, the date of the revocation hearing, and only a period of approximately two months after petitioner was origionally [sic] arrested on the parole violation warrant (*see* Resp.Exh.A, pp. 17-19). The total time of approximately two months is not unreasonable. ***Morrissey v. Brewer,*** 408 U.S. at 488, 92 S.Ct. at 2604.

CONCLUSION

WHEREFORE, for the reasons herein stated, respondent prays that this Court dismiss this petition without further judicial proceedings.

Respectfully submitted,

JEREMIAH W. "JAY" NIXON
Attorney General

/s/ Ron Jurgeson
RONALD L. JURGESON
Assistant Attorney General
Missouri Bar No. 35431

Penntower Office Center
3100 Broadway, Suite 609
Kansas City, MO 64111
(816) 889-5000
(816) 889-5006 FAX

Attorneys for Respondent.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 7th day of July, 1993, to:

Randy G. Spencer
Reg. No. 176948
Western Missouri
Correctional Center
Route 5, P.O. Box 1-E
Cameron, MO 64429

/s/ Ron Jurgeson
RONALD L. JURGESON
Assistant Attorney
General

BOARD OF PROBATION AND PAROLE
INVESTIGATION REQUEST

TYPE OF RELEASE: ADMINISTRATIVE

To: District 4
Date: 06/07/93
Date due: 06/24/93

Type of Investigation
___ Inter-District
_X_ Supplemental
___ Interstate
___ Executive Clemency
___ Personnel
___ Partial PSI
___ Violation Report

INTERSTATE COMPACT ONLY

We desire to transfer this person to you [sic] state

___ As a resident
___ Family resides your state
___ He/She has employment
___ With your consent

Supplemental Information Requested:

___ Complete PSI
___ Court Record
___ Prior Record
___ Circumstances of Offense
___ Other Charges Pending
___ Social History

XXX Home
XXX Employment
___ Other

Name SPENCER, Randy Number PR 176948
DOB 03/31/56 Race/Sex W/M

Plea/Crime: PG: Burglary 2nd Degree,
PG: Stealing Over $150

Date Sentenced: 11/08/90 11/08/90 00/00/00
Judge/County: JACK JACK

Length of Sentence 3 years (3, 3 cc)

Presumptive Release Date 08/07/93

Supervision/Expiration Date 10/16/93

Home: City Union Mission 1108 E. 10th Street
Kansas City, MO (816) 474-9380

Employment: To be obtained

Comments: Your reply to investigation request must be E-Mailed to the requesting institutional parole office with a copy to Central Office. The approved name plan address and Presumptive Release Date should be included on the reply.

Subject has the ADMINISTRATIVE release date of 08/07/93.

Special Conditions: No drinking, drug program

Krista Thompson: (WM07) WMCCP#Q9
Western Missouri Correctional Center
Cameron, MO
(816) 632-1390

Missouri Department of Corrections
Board of Probation & Parole

CHRONOLOGICAL DATA SHEET

NAME: SPENCER, Randy INST. NO.: 176948-W Page 1
SSN: 498-62-6752

Date Dictated: 2-2-93 Date Typed: 02-03-93

PRE-RELEASE REPORT

Randy Spencer has been approved by WMCC for his time credit release date of 8-7-93. Randy Spencer's conduct violations are on the attached time credit eligibility form. He has also received the following conduct violation in addition:

Date	Offense	Disposition
1-4-93	Disobeying an Order	10 days room restriction, 8 hours extra duty

DETAINERS: None

HALFWAY HOUSE: N/A

HOME: City Union Mission
1108 E. 10th Street
Kansas City, MO
816-474-9380

EMPLOYMENT: To be obtained

SPECIAL CONDITIONS: Previous-no drinking and drug program

MEDICAL: None

HOUSE ARREST:

1. ___ Eligible
2. X Not Eligible-Time is too short to Subject's maximum release date of 10-16-93
3. ___ Eligible, Not Recommended

RECOMMENDATION:

It is recommended that Spencer be administratively paroled on 8-7-93 with special conditions of no drinking and a drug program.

(signature on file)
/s/ John J. Baker

IPO: John Baker/ds (WMCC) E-Mailed _____

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS INSTITUTION
TIME CREDIT ELIGIBILITY WMCC

The inmate listed on this form is hereby certified to the Board of Probation & Parole for consideration for Administrative Parole. This certification for release is based upon the inmates conduct and program participation as reflected in the individuals summary.

INMATE NAME SPENCER, Randy

REGISTER NUMBER	CREDIT RELEASE DATE
176948	08-07-93

FELONY CLASS C

CONDUCT VIOLATIONS

(Attach additional sheets as needed)

RULE NO.	RULE TITLE	VIOLATION DATE	DISPOSITION
20	Disobeying an Order	01-04-93	10 day rm/cell restrict. 8 hrs. extra duty
24	Contraband	12-01-92	Prop. Imp/Confisc. 8 hrs. extra duty

PROGRAM PARTICIPATION

Return Parole Violator 8/25/92.

I RECOMMEND ✓ APPROVAL ___ DENIAL

SUPERINTENDENT SIGNATURE
/s/ Mac Kemna Pre. Rel. 2-2-93

DATE 1-29-93

(LOGO) STATE OF MISSOURI REVOCATION
DEPARTMENT OF CORRECTIONS
BOARD OF PROBATION AND PAROLE
BOARD ACTION SHEET

TAPE NUMBER 17455
HEARING NUMBER 5

NAME SPENCER, Randy NUMBER 176948

HEARING DATE 9-24-92 REVIEW DATE
[ ] INITIAL [ ] RECONSIDERATION
[ ] INTERIM [ ] PRE-RELEASE

MINIMUM ELIGIBILITY GUIDELINE DATE
SALIENT FACTOR SCORE

GUIDELINE RANGE TO

THE BOARD HEREON INSCRIBES ITS FINDINGS AND COMMENTARY AS A MATTER OF PERMANENT RECORD TO BE EXECUTED AS DIRECTED BY THE FOLLOWING ORDER AND DECISION.

DECISION AND REMARKS

revoke-release 10-16-93 /s/ B

[✓] REFER TO FULL BOARD
[ ] HIGH RISK

RELEASE

[ ] PAROLE
[ ] CONDITIONAL RELEASE
[ ] MAXIMUM RELEASE

DECISION AND REMARKS

Revoke-Release 10-16-93 /s/ Max MGC
Conditions 1-6-7 Trial Reporter

DECISION

[ ] GUIDELINE
[ ] ABOVE GUIDELINE
[ ] BELOW GUIDELINE

DECISION AND REMARKS

Revoked/Release 10-16-93 /s/ MAX BPP

SPECIAL CONDITIONS

[ ] NO DRINKING
[ ] DRUG PROGRAM
[ ] HALFWAY HOUSE
[ ] HOUSE ARREST
[ ] DETAINER

[ ] MENTAL HEALTH PROGRAM
[ ] SEX OFFENDER PROGRAM

DECISION AND REMARKS

Revoke-Release 10-16-93 /s/ lsm

VIOLATION

ORDER FOR ARREST 8-13-92
RETURNED 8-25-92
MAX. DATE 10-16-93
NEW MAX. DATE Time remains the same
[ ] ABSCONDER
[ ] SENTENCE OUTSIDE DAI

DECISION AND REMARKS

AGREE /s/ B

1. Release at this time would depreciate the seriousness of the offense committed or promote disrespect for the law.

   [ ] A. Seriousness of present offense

   [ ] B. Relatively high degree of sophistication shown in crime

   [ ] C. Weapons or excessive force involved

   [ ] D. Other (Explain)

2. There does not appear to be a reasonable probability at this time that the inmate would live and remain at liberty without violating the law.

   [ ] A. History of prior criminal involvement

   [ ] B. Abuse of prior probation, parole or treatment programs

   [ ] C. History of psychological problems

[ ] D. Habitual abuse of narcotics or alcohol

[ ] E. Dangerous or persistent offender

[ ] F. Short interval between offenses

[ ] G. Other (Explain)

3. The inmate has not substantially observed the rules of the institution in which confined.

[ ] A. Poor institutional adjustment

Reasons for decision below the guidelines, or for advancement of the presumptive release date.

4. [ ] A. Educational Program Achievement

[ ] B. Vocational Program Achievement

[ ] C. Industry Program Achievement

[ ] D. Counseling Program Achievement

[ ] E. Other (Explain)

5. [ ] A. Medical Parole

REPRESENTATIVE:

OPPOSING:

(LOGO) STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
BOARD OF PROBATION AND PAROLE
ORDER OF REVOCATION

WHEREAS, SPENCER, Randy G. (NAME) 176948 (NUMBER) was convicted of the crime of PG:Burglary 2nd; Stealing Over $150, in the Circuit Court of Jackson County, Missouri, and was on the 8th day of November 1990, sentenced to imprisonment in the Missouri Department of Corrections for a term of Three (3,3cc) years, was received at the Missouri Department of Corrections on the 14th day of November, 1990, and was thereafter confined under said sentence until the 16th day of April, 1992, upon which last-named day was released under the supervision of the Board of Probation and Parole and which Order of Release is now on file in the office of the Board of Probation and Parole.

WHEREAS, said SPENCER, Randy G. has signed a Waiver of Revocation Hearing dated the _____ day of _____, 19___, or personally appeared before the Board of Probation and Parole for the purpose of a Revocation Hearing on the 24th day of September, 1992, to answer charges of violation of parole/conditional release.

NOW, THEREFORE, after careful consideration of evidence presented, said charges which warrant revocation are sustained, to wit:

#1 – LAWS: I will obey all the federal and state laws, municipal and county ordinances. I will report all arrests to my Probation and Parole Officer within 48 hours.

#6 – DRUGS: I will not have in my possession or use any controlled substance except as prescribed for me by a licensed medical practitioner.

#7 – WEAPONS: I will, if my probation or parole is based on a misdemeanor involving firearms or explosives, or any felony charge, not own, possess, purchase, receive, sell or transport any firearms, ammunition or explosive device or any dangerous weapon as defined by federal, state or municipal laws or ordinances.

**Evidence relied upon for violation is from the Initial Violation Report dated 7-27-92.

By virtue of authority in us vested, we, the Missouri Board of Probation and Parole, do hereby annul, cancel and revoke the parole/conditional release issued the said SPENCER, Randy G. upon the said 16th day of April, 1992, and hereby order and direct confinement in an appropriate correctional facility of the State of Missouri, as designated by the Missouri Division of Adult Institutions, until the remainder of said sentence has been served in accordance with the terms of criminal judgment. Pursuant to State Law _____ _____ _____
(YEARS) (MONTHS) (DAYS)
will not be credited to the sentence.

The new maximum date will be Time remains the same (10-16-93).

Given, and certified to, under our hand, and the seal of said Missouri State Board of Probation and Parole, this 24th day of September, 1992.

BY ORDER OF THE BOARD OF PROBATION AND PAROLE

MEMBER /s/ Ronny Correy

(LOGO) Missouri — John Ashcroft, Governor

DEPARTMENT OF CORRECTIONS

Dick D. Moore, Director

Board of Probation and Parole

Cranston J. Mitchell
Chairman & Compact
Administrator

Ben W. Russell
Victoria C. Myers
Betty J. Day
Anthony G. Spillers
Board Members

Paul D. Herman
Chief State Supervisor

Patricia A. Parker
Secretary & Deputy
Compact Administrator

9-14-92

Dear Sir: Randy Spencer 176948

This is to advise that you have been set for a Revocation Hearing before the Missouri Board of Probation and Parole on September 24, 1992 9:00 am in the Parole Hearing Room at the Fulton Reception and Diagnostic Center.

It is your responsibility to notify anyone whom you wish to appear in your behalf at the hearing on that date.

Sincerely,

MISSOURI BOARD OF PROBATION AND PAROLE

/s/ Peggy L. McClure
Peggy L. McClure
Institutional Parole Officer

PLM/slr

**I have received a copy of this letter.

Subject /s/ Randy Spencer

Date 9-14-92

AN EQUAL OPPORTUNITY EMPLOYER
Services provided on a Non-discriminatory basis

(LOGO) STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
BOARD OF PROBATION AND PAROLE
WAIVER OF REVOCATION HEARING OR REQUEST FOR REVOCATION HEARING

SIGN AND DATE ONLY ONE OF THE FOLLOWING STATEMENTS:

I. **WAIVER OF REVOCATION HEARING**

I, _____, _____ have been
(NAME) (NUMBER)
returned to the Missouri Division of Adult Institutions for alleged violation of supervision. I am aware of my rights to a hearing, as stated in Section 217.720.

> "The Board shall either order him discharged from such institution or other detaining custody or shall cause the inmate to be brought before it for a hearing on the violation charged, under such rules and regulations as the Board may adopt. If the violation is established and found, the Board may continue or revoke the parole or conditional release, or enter such other order as it may see fit. If no violation is established and found, then the parole or conditional release shall continue."

Having been fully informed, and having full knowledge of these rights in the aforementioned section, I DO HEREBY WAIVE MY RIGHTS TO A REVOCATION HEARING BY THE BOARD OF PROBATION AND PAROLE.

NAME NUMBER DATE

II. **REQUEST FOR REVOCATION HEARING**

I, _____, _____ HEREBY
(NAME) (NUMBER)
REQUEST A REVOCATION HEARING before the Board of Probation and Parole, as provided for in the Statute as cited in Item I, above.

NAME Randy Spencer NUMBER 176948

DATE 9-14-92

DATE RETURNED TO DIVISION OF ADULT INSTITUTION 8/25/92

SIGNATURE WITNESSED BY /s/ Peggy L. McClure

DATE 9-14-92

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
BOARD OF PROBATION AND PAROLE

REVOCATION REPORT

X Parole
___ Conditional Release

Name: SPENCER, Randy No.: 176948 Date: 9-14-92

DATE INTERVIEWED: 9-14-92
Preliminary Hearing: X Waived ___ Held ___ N/A
Client provided with appropriate documents:
X Yes ___ No
MBPP-247 – Request for Attorney:
___ Offered X Not offered

Offense:	PG: Burglary 2nd Degree; Stealing over $150.00
Sentence:	3 years (3,3 cc)
County:	Jackson
Date Committed to DAI:	11-14-90
Date Paroled or Conditionally Released:	4-16-92
Order for Arrest and Return:	8-13-92
Date Taken Into Custody:	7-16-92
Date Returned to DAI:	8-25-92
Maximum Release Date:	10-16-93

TYPE OF VIOLATION
X (1) New Offense
___ (2) Absconder
X (3) Technical

OFFICER RECOMMENDATION
___ (1) Reinstate
X (2) Revocation

I. CONDITIONS AND CIRCUMSTANCES

#1-LAWS: by being arrested on 7-16-92 for Rape.

#6-DRUGS: by having in his possession and using a controlled substance, to wit: Cocaine.

#7-WEAPONS: by having in his possession or using as a dangerous weapon, to wit: screw driver.

Regarding the circumstances pertaining to the above alleged violated conditions, the following information was taken from the Initial Violation Report submitted 7-27-92 completed by District #4 Officer Jonathan Tintinger.

Pertaining to Condition #1-LAWS and #7-WEAPONS: According to the Initial Violation Report submitted,

Spencer was arrested on a 20 hour hold on the charge of Rape by the Kansas City Police Department on 7-16-92. According to the offense reports obtained, Spencer was introduced to the victim, Gina Bartlett, in a Kansas City area crack house, located in Kansas City, MO. After smoking Crack Cocaine, the victim was asked by Spencer for a ride home at approximately 6:00 p.m. The victim then gave Spencer a ride home and agreed to come upstairs, subsequent to his offer to give her gas money. After entering Spencer's apartment, Spencer and the victim smoked more Crack Cocaine, after which the victim attempted to leave the apartment. Spencer then allegedly jumped in front of her, and pushed her to the floor. The victim stated that Spencer got on top of her and started striking her in the face with his fist advising her to shut up. Allegedly, Spencer continued to punch her in the face until she begged him to stop and removed her clothes. Spencer then had sexual intercourse with the victim, removing his penis in time to ejaculate on the victim. Spencer then got dressed and told the victim to get dressed and directed her to drive him back to the drug house in order to purchase more Cocaine. Upon arrival at the drug house, the victim exited the vehicle and informed persons at the drug house that she had just been raped by Spencer. Spencer was chased away from the house by 2 of the male occupants and escaped. The victim was taken to the Independence Regional Hospital and received treatment for the Rape. The attending physician's report at the hospital indicated that the victim was visibility [sic] upset, crying at times, and evidenced

"bruises on the left side of mouth with moderate swelling, abrasion of inner-upper left lip, tender but not discolored on the right angular jaw." On 6-23-92 the victim identified Spencer as the rapist from a 6 picture color photo spread. Spencer gave a statement to the police officers that the victim's purse was on top of his refrigerator and he attempted to try to get the dope and pushed her away. . . . she fell and landed on his bed. When questioned whether or not he had hit the victim in the head with his hands, Spencer replied that he had not done it intentionally, or with his knowledge, however, it may have happened when he pushed her away from the purse. Spencer claimed to the detectives that the 2 had engaged in consensual intercourse. The victim reported that Spencer had a screw driver which he pressed against her side at some point during the alleged rape, but she was not clear at what point that happened. A warrant had not been issued to date of the violation report on this new offense.

Pertaining to Condition #6-DRUGS: As noted in the Initial Violation Report, Spencer allegedly met the victim at a drug house and they both smoked Crack Cocaine.

Regarding Condition #1-LAW and #7-WEAPONS: Spencer denies violating these conditions of parole.

Regarding Condition #6-DRUGS, Spencer admitted to this officer that he had in fact used Cocaine and advised this officer "so what". During the violation interview with this officer, Spencer portrayed a negative attitude and was somewhat verbally aggressive. He intends to have no witnesses at his hearing.

II. OTHER VIOLATIONS

None

III. RECOMMENDATION

Spencer appears before the Board on his first violation after being arrested for Suspicion of Rape. It does not appear that a warrant was ever issued for this offense. Spencer does admit to using Crack Cocaine, however, denies violating Conditions #1 and #7. Based upon the information presented in the violation report, there does appear to be significant evidence that Spencer has violated the conditions of his parole as stated. This officer would respectfully recommend to the Board that Spencer's parole supervision be revoked and he be scheduled for a hearing at a time deemed appropriate by the Board. Further parole consideration will be necessary in this case.

MAXIMUM RELEASE DATE: 10-16-93

Respectfully submitted,

/s/ Peggy L. McClure
Peggy L. McClure
Institutional Parole Officer
Fulton Reception and Diagnostic Center

PLM/slr

DEPARTMENT OF CORRECTIONS
ADULT INSTITUTIONS
FACE SHEET

REGISTER NO: 176948
ILLEGIBLE NO: M000414829
SSN: 498-62-6752
ILLEGIBLE NO: 77598M5

COMMITMENT NAME: SPENCER RANDY G
TRUE NAME: SPENCER RANDY G
AGE AT COMMITMENT: 34

* * ALIAS NAMES * *

SPENCER GLENN : SMOTHERS RANDY
SPENCER RANDY : SPENCER RANDY G
SPENCER RANDY H :

BIRTH DATE: 03 31 1956
BIRTH PLACE: BLOOMINGTON, IL
ETHNICITY: NON-ILLEGIBLE
HEIGHT: 5 FT. 11 IN. WEIGHT: 175
SEX: MALE RACE: WHITE
BUILD: STOCKY HAIR: BLONDE/
EYES: GREEN COMPLEXION: FAIR

* * SCARS MARKS AND TATTOOS * *

CODE-1: TAT R ARM
2: TAT UR ARM
3: TAT LP ARM
4: TAT L ILLEGIBLE
5: TAT R ILLEGIBLE

DESCRIPTION-1: BOWLING BALL #1
2: RANDY ON ROSE
3: TIGER
4: MOM, DAD, FLOWER
5: TAMMY, STAR

RELIGIOUS PREFERENCE: BAPTIST
MARITAL STATUS: NEVER MARRIED

* * EMERGENCY ADDRESS * *

NAME: SMOTHERS ROBERT
RELATIONSHIP: STEP-FATHER
STREET/CITY/STATE/ZIP:
#A-15 TERRA LIPPA TRL WARRENSBURG MO 64093
TELEPHONE NUMBER: 816-429-1471

NAME: WILSON JUDY
RELATIONSHIP: SISTER
STREET/CITY/STATE/ZIP:
708 DITMAN KANSAS CITY MO 64127
TELEPHONE NUMBER: 816-252-9382

* * MILITARY SERVICE * *

BRANCH: NEVER SERVED TYPE OF DISCHARGE:
DISCHARGE DATE: 00 00 00

* * PRIOR RECORD * *

PROBATION / MO: 02 PAROLE /
MO: 03 IMPRISONMENT /
MO: 03 ESCAPE / MO: 00
OTHER: 00 OTHER: 00 OTHER: 00 OTHER: 00

PRIOR REGISTER NUMBERS:
167629 048909 032238

* * OCCUPATION OR TRADE * *

OCCUPATIONS: LABORER (GENERAL)

* * SENTENCE SUMMARY * *

RECEIVED DATE: 11 14 1990
RETURNED FROM: CREDIT TIME
RELEASE DATE: 08 25 199(illegible)

NUMBER OF SENTENCES: 2
MAXIMUM AGGREGATE
RELEASE DATE: 10 16 199(illegible)

TOTAL SENTENCES LENGTH: 3
TIME CREDIT
RELEASE DATE:

* * COMMENTS * *

3 YRS (3.300)
PAROLED: 4-16-92; RET PV: 8-25-92.

REGISTER NO: 176948
COMMITMENT NAME: SPENCER RANDY G

* * PRESENT CONVICTIONS * *

001
CAUSE NO: CR904834 CLASS: C OCN:
MO CODE: 14020990 NCIC: 2299
PG:BURGLARY 2
SENTENCE DATE: 11 08 1990 LENGTH: 003 00 00
SENTENCE COUNTY: JACK RECEIVED: 11 14 1990
JAIL: 0028
SENTENCE START DATE: 10 17 1990
RETURN: 08 25 1992 NON-CREDITED:
MAXIMUM RELEASE: 10 16 1993 MAX: 10 16 1993
DISC TYPE:
CC/CS: REL TO SEQ: SENT STAT: ACTIVE
DISC DATE:

002
CAUSE NO: CR904834 CLASS: C OCN:
MO CODE: 15010990 NCIC: 2399
PG: STEALING OVER $150.00
SENTENCE DATE: 11 08 1990 LENGTH: 003 00 00
SENTENCE COUNTY: JACK RECEIVED: 11 14 1990
JAIL: 0028
SENTENCE START DATE: 10 17 1990
RETURN: 08 25 1992 NON-CREDITED:
MAXIMUM RELEASE: 10 16 1993 MAX: 10 16 1993
DISC TYPE:
CC/CS: CC REL TO SEQ: 001 SENT STAT: ACTIVE
DISC DATE:

IN THE CIRCUIT COURT OF
JACKSON COUNTY, MISSOURI

STATE OF MISSOURI NO. CR90-4834
PLAINTIFF DOCKET ACJ
vs. DIVISION 101
Randy G. Spencer
DEFENDANT

JUDGMENT
(GUILTY PLEA – NO PROBATION)

On November 8 19 90, came the attorney for the State Robert Adams and defendant appeared in person and by attorney, Kent Hall.

It is adjudged that defendant, having been found guilty upon a plea of guilty entered on November 8, 1990, of the offense(s) of Count 1 – Burglary 2° Count 2 – Stealing over $150.00 a class C felony/~~misdemeanor~~ is guilty of said offense(s).

It is ordered and adjudged that defendant is sentenced and committed to the custody of the Division of Adult Institutions/~~Jackson County Department of Corrections~~ for imprisonment for a period of Three years each count to run concurrent
Acknowledgment read by the Court and signed by the defendant.

It is ordered that the Court Administrator deliver a certified copy of this judgment and commitment to the Jackson County Department of Corrections and that the copy serve as the commitment of defendant.

It is ordered and adjudged that the State of Missouri have and recover from defendant the sum of $46.00 for the Crime Victims' Compensation Fund and that execution issue therefor.

It is ordered and adjudged, pursuant to Chapter 600 R.S.Mo., that the State of Missouri have and recover from defendant the sum $ 50.00 for services of the Public Defender, and that execution issue therefor.

November 8, 1990 /s/ Illegible
DATE Judge

$46 Crime Victims' Compensation Fund unpaid.

/s/ Illegible
D.C.A.

The Jackson County Department of corrections hereby endorse upon this commitment that this person spent 29 days in jail.

/s/ Annette Jones
Criminal Records Unit

10-17-90 thru 11-14-90

TRUE COPY - ATTEST
CIRCUIT COURT OF
JACKSON COUNTY, MO
COURT ADMINISTRATOR'S
OFFICE
DEPARTMENT OF
CRIMINAL RECORDS
BY /s/ Illegible DCA

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
BOARD OF PROBATION
AND PAROLE

405 East 13th Street
5th Floor
Kansas City, MO 64106
(816) 889-2271

VIOLATION REPORT

Name: SPENCER, Randy G. No.: IN176948-P
Date: 7/27/92

TYPE OF CASE
Board

TYPE OF REPORT
Initial

Crime: PG: Stealing
0/$150; Burglary II

Sentence:
3 years (3,3 cc)

Date Supv. Began:
04/16/91

Expires:
10/16/93

TYPE OF VIOLATION:
Felony (1)

OFFICER'S RECOMMENDATION:
Continuance (1)

VIOLATION INTERVIEW:
Date: 7/17/92
Time: 4:20 p.m.

Place:
Jackson County Jail
1300 Cherry, KCMO 64106

X Client Advised that Any Statements May be Included in Violation Report

X Client Given Booklet "Rights of Alleged Violator"

X Waived Preliminary Hearing/Requested Preliminary Hearing

IN CUSTODY? X Yes Date: 7/17/92
Location: Jackson County Jail

I. Introduction

Violation of Parole Condition #1, by allegedly committing the offense of Rape.

Violation of Parole Condition #6, by the use of Cocaine.

Violation of Parole Condition #7, by use of a dangerous weapon.

II. Particulars of Violation

Spencer was arrested on a twenty-hour hold on a charge of Rape by Officers of the Kansas City, Missouri Police Department on 7/16/92, at an unknown time and unknown place, and subsequently held on the authority of a warrant issued by this officer dated 7/17/92.

Circumstances of the violation of Condition #1 are as follows: Accorditg [sic] to KCMO Police Department Report #92-077642, on 6/3/92, Spencer was introduced to the victim, Gina Bartlett, in a Kansas City Area Crack House, located near 24th and Park Streets, KCMO. After smoking crack, the victim was asked by Spencer for a ride home at approximately 6:00 p.m. The victim then gave Spencer a ride home

and agreed to come upstairs, subsequent to his offer to give her gas money. After entering Spencer's apartment, Spencer and the victim smoked more crack, after which the victim attempted to leave the apartment. Spencer then allegedly jumped in front of her and pushed her to the floor. The victim stated that he got on top of her and started striking her in the face with his fists and told her to shut up. Allegedly, Spencer continued to punch her face until she begged him to stop and removed her clothes. Spencer then enjoyed sexual intercourse with the victim prior to his removing his penis in time to ejaculate on the victim. Spencer then got dressed and told the victim to get dressed, after which he directed the victim to drive him back to the drug house in order to purchase more Cocaine. Upon arrival at the drug house, the victim exited the vehicle. The victim informed the persons at the drug house that she had just been raped by Spencer. Next, Spencer was chased away from the house by two of the male occupants and escaped. The victim entered the drug house, telephoned her parents, and was picked up at the house by her father and brother, prior to receiving treatment for the rape at Independence Regional Hospital. The attending physician's report at Independence Regional Hospital indicated that the victim was visibly upset, crying at times, and evidenced "bruises on the left side of mouth with moderate swelling, abrasion of inner-upper left lip, tender but not discolored on right angular jaw." Members of the KCPD were dispatched on the reported rape by hospital personnel. On 6/13/92, officers of the KCMO Police Department Sex Crimes Unit responded to an anonymous tip that the name of the rapist was Randy Spencer. An ALERT Systems check of Randy Spencer by Police detectives provided additional descriptive

information as well as a mug shot of Spencer obtained from the Police Records Bureau. On 6/23/92, the victim identified Spencer as the rapist from a six-picture color photospread. After being detained for questioning regarding this offense on 7/16/92, Spencer told investigating detectives that "her purse was on top of my refrigerator, and I attempted to try to get to the dope and pushed her away. . . . she fell and landed on my bed." When asked by detectives whether or not he had hit the victim in the head with his hands, Spencer replied, "not intentionally, not with my knowledge, it may have happened when I pushed her away from the purse." However, Spencer claimed to investigating detectives that the two had engaged in consensual sexual intercourse.

This case was turned over on 7/17/92 from the KCMO Police Department Sex Crimes Unit to the Jackson County Prosecuting Attorney's Office. As of the date of this writing, no State charges have been formally filed.

In response to the above violation, Spencer had no response.

Circumstances of the violation of Condition #6 are as follows: According to the KCMO Police Department Report #92-077642, Spencer admitted to smoking Crack Cocaine, on 6/3/92.

In response to the above violation, Spencer admitted the violation.

Circumstances of the violation of Condition #7 are as follows: According to the above-mentioned KCPD Report #92-077642, the victim stated that Spencer had a screwdriver which he, "pressed" against her side, at some point during the alleged

rape, but that she wasn't clear at what point that happened.

In response to the above violation, Spencer denied the violation.

III. Other Violations

None.

IV. Recommendation

This officer's recommendation is for Continuance and placement in Farmington Treatment Center/ Mineral Area Treatment Center. Spencer has admitted to smoking Crack Cocaine within two weeks of being released from Fellowship House, on 5/21/92. Spencer received a violation report from Fellowship House staff, relative to using Cocaine on or about 4/2/92. Spencer has admitted before to the use of "anything I can get my hands on," relative to drugs. Yet, of greater concern to the undersigned officer than Spencer's cavalier attitude regarding drug use while on parole, is the fact that Spencer admitted to investigating detectives that he pushed the victim until she fell yet can't clearly recall whether he "intentionally" assaulted her, although "it may have happened." This officer contends that Spencer, regardless of the disposition of this new case, is obviously a violent and impulsive individual who represents a clear danger to the community. This officer contends that Spencer has every intention of continuing to use drugs whenever possible, despite what help is offered him. Randy Spencer is a registered sex offender, having been given a five-year prison sentence for Sodomy in 1983. However, an

ultimate recommendation based on the alleged violations of Conditions #1 and #7 is being held in abeyance pending disposition of this new rape charge, by the Jackson County Prosecuting Attorney's Office. In the event formal charges are ultimately filed, a separate recommendation will be forthcoming. Meanwhile, in view of the alleged rape, it is deemed necessary to immediately remove Spencer from the community. The Prosecuting Attorney's Office has advised it will be a month or so before the case is reviewed for possible filing of charges. No objection was posed to returning Spencer as a parole violator in the interim.

V. Availability

Spencer is currently in the custody of the Jackson County Jail, 1300 Cherry, Kansas City, Missouri 64106, and is immediately available to the Board.

Respectfully submitted,

Jonathan L. Tintinger/04-07
State Probation & Parole Officer
Kansas City, MO
District #4

Illegible
Unit Supervisor

Date: _____

JLT/bar 08/06/92

SIGNATURE ON FILE
WAIVER ON FILE

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER, Petitioner, vs. MIKE KEMNA, Respondent.	)	No. 93-0299-CV-W-3-P (Filed Jul. 13, 1993)

ORDER

Upon motion of respondent, and for good cause shown, it is ORDERED that respondent is granted an enlargement of time up to and including July 7, 1993, in which to file a response to the petitioner's petition as directed by this Court's order to show cause.

IT IS SO ORDERED.

/s/ Elmo B. Hunter
ELMO B. HUNTER
UNITED STATES
DISTRICT JUDGE

Kansas City, Missouri,

Dated: 7-13-93.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER, Petitioner,	)	Case No. 93-0299-CV-W-3-P
vs.	)	(Filed Jul. 14, 1993)
MIKE KEMNA, Respondent.	)	

PETITIONER'S MOTION AND REQUEST FOR FINAL DISPOSITION OF THIS MATTER

Comes now, the petitioner, Randy G. Spencer, pro-se, and moves this court to make a final adjucation [sic] of this matter and in support of this request, this petitioner will state as follows:

1. That this petitioner is moving this court for a final adjudication of this matter, because this petitioner has been granted "good time" and this petitioner *may* be released from confinement, on August 7, 1993, and if a final disposition of this matter is not reached by August 7, 1993, then this petitioner will suffer irreparable harm, by being denied the rights and benifits [sic] which are secured to this petitioner by the United States constitution, through the use of the Writ of Habeas Corpus, resulting in this petitioner being illegally confined and restrained from his liberty, for (13) months of this petitioners life, without due process of the law, and leaving this petitioner with no way to vindicate himself, during this time.

2. The *if* this petitioner is released from confinement on August 7, 1993 and *if* this matter is not adjucated [sic] by then, then all of this petitioners time, money, and efforts, will have been for nothing, as this court knows that when this petitioner is released, and if the issues of this petitioners petition for Writ of Habeas Corpus are not resolved by then, then this petitioners petition and the issues thereof, become moot, as no relief can be granted to this petitioner, *by way of the Writ*, if this petitioner is no longer in confinement.

3. That this petitioner realizes that such a request is highly unusual, but under these circumstances, not entirely unreasonable, esspicailly [sic] in light of the facts that when this petitioner was arrested and detained for alleged parole violation, this petitioner had (14) months left to serve on this petitioners sentence, and with it taking over two (2) months for this petitioner to even see the parole board, for revocation, another (6) six months exhausting State Judicial Remedies, (2) two months getting a show cause order issued in this case, and (2) two more months spent on the respondent requesting extensions of time, all of which has caused this petitioner to virtually serve out the remainder of his sentence, and leaving this petitioner unable to regain his freedom, by the use of the Writ.

4. That this court has the jurisdicition [sic] to invoke a final adjucation [sic] and judgement in this matter, through the Federal Rules of Civil Procedure, and pursuant to, in accordence [sic] with, but not limited to, Titles 28 U.S.C. §2241 et seq. (1993), §1331 Federal Question, § §2201-2202 Declatory [sic] Judgement, or any other remedy that this court may have at its disposial [sic].

5. That this petitioner believes that the respondents attornies [sic] have known about this petitioners *possibale [sic] release*, on August 7, 1993 and that the true reasons behind the respondents requests for extensions of time, was to vex this case as long as possible, all the while, waiting for this petitioner to be released from confinement, then to move this court for a dismissal of this case, on the grounds that no relief can be granted to this petitioner, by way of the Writ, because this petitioner would not longer be in confinement, making this petitioners case, moot.

6. That in this courts order of May 13, 1993, and granting this petitioners claimes [sic], a liberal construction, under *Haines vs. Kerner*, 404 U.S. 519 (1972), this court has assertained [sic] from this petitioners petition, that this petitioner was challenging the revocation of this petitioners parole and that this petitioner had listed the following grounds for relief:

(1) That this petitioner was denied the right to a preliminary hearing concerning alleged parole violations;

(2) That this petitioners conditional release date was suspended without a hearing;

(3) That this petitioners parole revocation hearing was constitutionally flawed and did not comport with the principles of due process; and

(4) That this petitioner was denied the oppertunity [sic] to review the evidence relied on in revoking this petitioners parole.

7. That this petitioner will attempt to substaniate [sic] the grounds, listed herein, by way of this courts

order on May 13, 1993, as the grounds for which this petitioner seeks relief and a final adjucation [sic] of this matter.

8. That on July 16, 1992, this petitioner was "picked up", not arrested, by the Kansas City Police Department, for the purpose of a (20) twenty hour investigation, into the alligation [sic] of the crime of rape.

9. That before the (20) twenty hour investigation was over, on July 17, 1992 this petitioners parole officer issued a warrent [sic] for this petitioners arrest, for parole violation, and, this petitioner was taken to the Jackson County Jail, in Kansas City, Missouri. Please see exhibit A.

10. That also on July 17, 1992 this petitioners parole officer conducted an interview with this petitioner and this petitioners parole officer handed this petitioner a copy of the warrent [sic] for arrest and detention of this petitioner, a copy of the rules and regulations of the Missouri Department of Probation and parole, in a hand-booklet entitled, "Rights of Alleged Parole Violator to Preliminary and Revocation Hearing", and, at the ill-advice of this petitioners parole officer, who stated that he had probable cause to violate this petitioner and that "this is only a formality", he asked this petitioner to sign a waiver to a preliminary hearing on the (2) two alleged violations of the conditions of this petitioners parole, which where shown on the warrent [sic] for arrest and detention of this petitioner, and this petitioner was given a copy of this signed waiver as well. Please see exhibits A and B.

11. That after this petitioner had signed the waiver, exhibit "B", and was able to read and comprehend what this petitioners rights *actually where [sic]*, at a preliminary hearing, even under the rules and regulations of the Missouri Department of Probation & Parole did this petitioner realize that he should not have signed a waiver of his right to a preliminary hearing, on the (2) two alleged parole violations, that where on the warrent [sic] for arrest and detention of this petitioner.

12. That on approximatly [sic] August 7, 1993, while this petitioner was still in the custody of the Jackson County Jail, this petitioners parole officer brang [sic] this petitioner a copy of the violation report, prepaired [sic] by this petitioners parole officer, and as this petitioner had read this violation report, this petitioner noticed that this petitioner was now being violated for (3) three violations of the conditions of this petitioners parole, and not just the (2) two that where [sic] on the warrent [sic] for arrest and detention of this petitioner. Please see exhibit C and compair [sic] to exhibit A.

13. That this petitioner *"did not sign a waiver"* of this rights to a preliminary hearing and the rights secured therein, on this third alleged violation of the conditions of this petitioners parole, and for this petitioner to be brought back to prison and violated (revoked) on this third alleged violation of this petitioners parole, without first affording this petitioner with a preliminary hearing, and the rights secured therein, was to have violated this petitioners rights under the 5th and 14th Amendments to the Constitution, to not be deprived of "liberty" without Due Process of Law, and even the Supreme Court Justice BRENNAN has stated:

> "I agree that a parole may not be revoked, consistently with Due Process Clause, unless the parolee is afforded, first, a preliminary hearing. . . . "

Morrissey v Brewer, 408 U.S. 471, 92 S.Ct. 2593, 2605 (1972) and *Gagnon v Scaprelli*, 411 U.S. 778, 93 S.Ct. 1756 (1973), however, this petitioners parole was revoked, without first affording this petitioner with a preliminary hearing on the third alleged violation of the conditions of this petitioners parole.

14. That by not affording this petitioner with a preliminary hearing and the rights secured therein, on the third alleged violation of the conditions of this petitioners parole, as stated on the violation report, (exhibit C), this petitioner was denied his right and ability to defend himself, to present witnesses and documented evidence, the right to confront and cross-examine any adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation), and disclosure of the evidenc [sic] against this petitioner, all of which might have been used and asserted by this petitioner, to prove that there might not have been probably cause to take this petitioner back to prison.

15. That also by not affording this petitioner with a preliminary hearing and the rights secured therein, on the third alleged violation of the conditions of this petitioners parole, this petitioner was prejudiced, in that if this petitioner was afforder [sic] a preliminary hearing and the rights secured therein, on the third alleged violation of the conditions of this petitioners parole, then this petitioner might have been able to shed enough light to have cleared himself on the third alleged violation, and

this petitioner, as well, might have been able to clear himself on the first (2) two alleged violations of the conditions of this petitioners parole, which had caused this petitioner to be arrested and detained, as all three (3) alleged violations of the conditions of this petitioners parole, where related, and to have cleared this petitioners self on one alleged violation, was to have possibly cleared this petitioners self, on all three (3) alleged violations of the conditions of this petitioners parole.

16. That this petitioner remained in the custody of the Jackson County Jail, in Kansas City, Missouri, until August 25, 1992, when this petitioner was transported back to the Missouri Department of Corrections, at the Fulton Reception & Diagnostic Center, (F.R.D.C.), in Fulton, Missouri.

17. That while this petitioner was detained at the F.R.D.C., on September 14, 1992, this petitioner was interviewed by an institutional parole officer, a Peggy McClure.

18. That at this interview, on September 14, 1992, Peggy McClure handed this petitioner a copy of the warrent [sic] for arrest and returen [sic] of this petitioner, a copy of the scheduling notice for this petitioners revocation hearing, and a copy of the form in which this petitioner had requested a revocation hearing on. Please see exhibits D. E. and F.

19. That also at this interview, on September 14, 1992, Peggy McClure imformed [sic] this petitioner that it was this petitioners responsibility to contact witnesses *and to secure counsel,* for this petitioners revocation hearing, on September 24, 1992, and that she was authorized

to offer this petitioner (1) one stamp and a phone call, for this petitioner to contact witnesses and to secure counsel with, and further, that this petitioner was being brought in front of the board, for violation of Laws, Drugs, and the posession [sic] of a dangerous Weapon, all of which this petitioner denied.

20. That on September 20, 1992, this petitioner wrote the institutional records office, at F.R.D.C., to find out if this petitioner had any holds, warrents [sic] or detainers, placed against this petitioner. Please see exhibit G.

21. That this petitioner was reading in his handbooklet, entitled "Rights of Alleged Violator To Preliminary and Revocation Hearing", issued under the authority of the Missouri Department of Probation and Parole, and on pages 8 & 9, of this booklet, this petitioner noticed, among other things, that this petitioner had been given the right to have a represenative [sic] of *"this petitioners choice"*, at this petitioners revocation hearing, on September 24, 1992, and that such choices may include, family members, friends, employers and legal counsel.

Please see exhibit H.

22. That also on September 20, 1992, this petitioner, being faced with very littel [sic] time and virtually no money, had wrote the institutional parole officeer [sic], Peggy McClure, and this petitioner requested that this petitioner be allowed to have an inmate paralegal, a David Graham, *at F.R.D.C.*, to be present and this petitioners legal counsel, at this petitioners revocation hearing, on September 24, 1992. Please see exhibit I, with the

original being on file with the Supreme Court for the State of Missouri, under case number, 75670.

23. That on September 21, 1992, this petitioners note, exhibit I, was returned to this petitioner, with this petitioners request being denied. Please see exhibit I.

24. That although the State of Missouri has not incorporated into its legislation, the rights of a parolee at and in a revocation hearing, according to Missouri Practice, volume 19, section 551, this petitioner did have the right to a represenative [sic], of *this petitioners "choice"*, at this petitioners revocation hearing, on September 24, 1992, and appearently [sic] this is endorsed, along with other rights, by the Supreme Court in, *Black v Ramano*, U.S. 105, S.Ct. 2254, 85 L.Ed.2d 636 (1985); *see also, Abel v Wyrick*, 574 S.W.2d 411 (Mo. banc 1978).

25. That even under the rules and regulations of the Missouri Department of Probation & Parole, exhibit H., this petitioner had a liberty interest involved, in this petitioner having a represenative [sic] of this petitioners "choice", at this petitioners revocation hearing of September 24, 1992, and courts have held that a "liberty interest" could be found in state statutes, judicial decrees, or by rules and regulations; *see, Kozlowski v Coughlin*, 539 F. Supp. 852 (S.D.N.Y. 1982); *Parker v Cook*, 642 F.2d 865 (1981); and *Pagliese v Nelson*, 617 F.2d 916 (1980). Please see exhibit H.

26. That also, when this petitioner requested a represenative [sic] of this petitioners *"choice"*, this petitioner chose to be represented by an inmate para-legal, *at F.R.D.C.*, to represent this petitioner at this petitioners revocation hearing, on September 24, 1992, but when this

petitioners request was denied, in essance [sic], this petitioner was denied the right to legal counsel, at this petitioners revocation hearing, as the requirements of due process are the same for probation and parole revocation hearings, *see Baker v Wainwright*, 527 F.2d 372 (1976), and the requirement of due process is,

> " . . . counsel should be provided for indigints [sic] on probation or parole cases where, after being imformed [sic] of his right to request counsel, the probationer or parolee makes such a request . . . "

Gagnon v Scaprelli, 411 U.S. 778, 93 S.Ct. 1756, 1760 n. 5 (1973).

27. That this petitioner is not claiming as a ground for relief, that this petitioner was denied his right to be imformed [sic] of the right to request counsel, although this surely should be considered, but when this petitioner was told that it was this petitioners "responsibility" to secure counsel, for this petitioners revocation hearing, and with this petitioner having virtually no money, when this petitioner wrote the note requesting that an inmate para-legal, *F.R.D.C.*, be allowed to represent this petitioner, at this petitioners revocation hearing, if the State of Missouri was not going to provide this petitioner with legal representation, then this petitioner should not have been denied the right to have a represenative [sic] of this petitioners *choice*, but with this petitioner *not* being imformed [sic] of his right to request counsel, and that counsel might be provided for this petitioner, if this petitioner was indigint [sic] and denied the alligations [sic], along with this petitioner *not* being allowed to have a represenative [sic] of *this petitioners "choice"*, choice being

an inmate para-legal, then this petitioners minimum due process rights, as described in either *Morrissey v Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972), or *Gagnon v Scaprelli*, 411 U.S. 778, 93 S.CT. 1756 (1973), were violated and denied to this petitioner.

28. That if nothing else, when this petitioner wrote the note (exhibit I), to Peggy McClure, at F.R.D.C., an inquiry should have been held to determine if legal counsel, should have been appointed for this petitioner, by the Missouri Department of Probation & Parole, but it wasn't.

29. That on September 24, 1992, this petitioners revocation hearing, went as scheduled, without informing this petitioner of his right to confront and cross-examine witness, and by not imforming [sic] this petitioner of his right to confront and cross-examine witnesses, this petitioners due process rights, may have been violated. *See, Lawrence v Smith*, 541 F.Supp. 179-187 (W.D.N.Y. 1978). This petitioner is not claiming this as a ground for reliefe [sic], but surely this should be considered.

30. That this petitioners revocation hearing, on September 24, 1992, was centered arround [sic] this petitioner being questioned about the alligation [sic] of rape against this petitioner, with this petitioner consistintly [sic] challenging and denying the accuracy of the violation report, and one parole board member started the hearing off, by stating, I see here that the violation repot [sic] says that you (meaning this petitioner) have been arrested and charged with the crime of rape, and immeadiatly [sic] this petitioner spoke up and stated that this petitioner had not been charged with the crime of rape and this petitioner

handed the board member, exhibit G, to show that even some (70) days later, this petitioner had still not been charged with the crime of rape, or any other crime, sence [sic] this petitioner had been put on parole.

31. That even with the knowledge that this petitioner had not been charged with the crime of rape, this one parole board member continued to question this petitioner about the alligation [sic], with this petitioner continuing to deny it.

32. That this on parole board member stated that the violation report states that this petitioner had used a weapon (screw driver) against the alleged victim, and this petitioner pointed out that on page two (2) of the violation report, that the report stated that the alleged victim wasn't *"clear"* as to what point the weapon *"might"* have even been used, clearly putting doubt on the accuracy of the alleged victims statement and the violation report or if this petitioner even used a weapon, at all, against anyone.

33. That this one parole board member started showing signs of irratation [sic] and stated that the violation report states that this petitioner had admitted to useing [sic] drugs, but this petitioner denied this alligation [sic].

34. That this one parole board member really got irratated [sic] at the proceeding of this petitioners revocation hearing, and slamming his hands on the tabel [sic], this one parole board member had stated, you mean that you are not going to admit to these violations, *and this petitioner said no*, as the violation report was untrue and

the alligations [sic] against this petitioner are wrong and that this petitioner should not be getting violated.

35. This petitioners revocation hearing, on September 24, 1992, was ended, but this petitioner was never told "why" there where [sic] no adverse witnesses present and against this petitioner at this petitioners revocation hearing, but for the purpose of this court, the hearsey [sic] violation report, exhibit C, clearly states that this petitioner was at the K.C.P.D, on July 16, 1992, on a *"twenty hour hold"*, and that the alleged violations #1, LAWS, and, #7, WEAPONS, where being held in *abeyance*, but the Missouri Department of Probation & Parole revoked this petitioners parole, on all three alleged violation, even though this petitioner had not violated any laws or been found to be in posession [sic] of any dangerous weapons. Please see exhibit N.

36. That for the purposes of this court, this date, this petitioner has not been arrested and/or convicted of any crime, nor has this petitioner been found to be in posession [sic] or tested positive, of any drugs, sence [sic] this petitioner was placed on parole, on April 16, 1992, nor has this petitioner been found to be in posession [sic] of any type of a dangerous weapon, nor has this petitioner been found to be in use of or admitting to the use of drugs, since [sic] this petitioner was placed on parole, on April 16, 1992 and the Missouri Department of Probation & Parole should not have revoked this petitioners parole, on September 24, 1992, for violating the conditions of this petitioners parole, as described on exhibits F & N, and according to Mo. Rev. Stat. section 217.720;

> "If no violation is established and found, then the parole or conditional release shall continue . . . "

37. Taht [sic] a violation of the conditions of this petitioners parole, was not established or found on violations #1. Laws & #7. Weapons, and the only violation of the conditions of this petitioners parole that *"might"* have been established, was the *alleged use of drugs*, and that is *only* because the violation report, hearsey [sic], stated that this petitioner had admitted to useing [sic] drugs, which this petitioner did not.

38. That

> " . . . the first step of revocation decision involves retrospect factual question whether parolee had in fact violated one or more conditions of his parole. Only if it is determined that the parolee did violate the conditions does the second question arise: should the parolee be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation."

Gagnon v Scaprelli, at 784, 93 S.Ct., at 1760, quoting Morrissey 408 U.S., at 479-80, 92 S.Ct., 2593.

39. That the spirit of those decessions [sic] *require* that the Missouri Department of Probation & Parole, must find that this petitioner "had in fact violated one or more of the conditions of" this petitioners parole, and that once the violation has been "established", (Mo. Rev. Stat. 217.720), by varified facts", Morrissey, supra, Key 272, should this petitioner be recommitted to prison or should other steps be taken to improve chances of rehabilitation for this petitioner?

40. That this petitioners parole officer had seen fit to recommend *"Continuance"* of this petitioners parole, (page 3 of exhibit C), but the Missouri Department of Probation & Parole decided to revoke this petitioners parole, without "varified [sic] facts", and to recommitte [sic] this petitioner to prison without even attempting to improve this petitioners chances of rehabilitation, completely destroying [sic] the spirits of both Gagnon & Morrissey, supras.

41. That this petitioner believes that a large part of the parole boards prejudice against this petitioner, was due to the fact that this petitioners parole office had stated in the violation report, (page 3 of exhibit C), that this petitioner was a registered sex offender, and with this petitioner being questioned about the alligation [sic] of rape, the parole board *conclusively presumed* this petitioner to be guilty, and revoked this petitioners parole.

42. That the Supreme Court in *Morrissey v Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972), Constitutional Law, Key 272, has stated:

> "What is required by due process for parole revocation is informal hearing structure to assure that finding of parole violation will be based on varified [sic] facts . . . U.S.C.A.14",

and the District Court for the Southern District of New York has clearly stated;

> "At parole revocation hearing, burden is on the state to show violation of conditions of parole by preponderance of evidence, . . . "

Johnson v Kelsh, 664 F.Supp. 162 (S.D.N.Y. 1987).

43. That this petitioners parole was not revoked on *"varified [sic] facts"* or by a *"preponderance of the evidence"*, but rather, this petitioners parole was revoked on unsupported hearsey [sic] evidence, which violated this petitioners rights under the 5th, 6th and 14th Amendments to the Constitution of the United States.

44. That for the purposes of this court, this petitioner is relying heavely [sic] on the decession [sic] in State Ex Rel. *Mack v Purkett*, 825 S.W. 2d 851 (Mo. banc 1992), and *IN RE CARSON*, 789 S.W.2d 495 (Mo.App.1990), where both of those courts held that the petitioners in those cases, were denied their minimum due precess [sic] rights, by not being allowed to confront and cross-examine adverse witnesses, and the Supreme Court for the State of Missouri, in Purkett, supra, page 854, emphised [sic]:

> "The court concluded by not being able to confront and cross-examine the person who provided the evidence, the petitioners due process rights where [sic] violated. 789 S.W.2d 497".

45. That not only was this petitioner not allowed to confront and cross-examine this petitioners parole officer, at this petitioners revocation hearing, on September 24, 1992, but this petitioner was *"never"* told *"why"* there were no adverse witnesses at this petitioners revocation hearing, and the Supreme Court for the state of Missouri has stated, in Purket, supra, page 857:

> " . . . the clear requirment [sic] of Morrissey (is) that the hearing officer speciffically [sic] find good cause for not allowing confratation [sic]. Undoubtedly, that requirment [sic] must be meet [sic] as a precondition to considering purely

> hearsey [sic] statements of persons not subject to confratation [sic] . . . "

and for the parole board to not imform [sic] this petitioner, at the begining [sic] of this petitioners revocation hearing, *"why"* there were no adverse witnesses at this petitioners revocation hearing, on September 24, 1992, was to deny this petitioner of his minimum due process rights, as described in either, *Morrissey v Brewer*, 408 U.S. 471, 92 S.Ct. 2593 (1972), and, *Gagnon v Scaprelli*, 411 U.S. 778, 93 S.Ct. 1756 (1973).

46. That this petitioner was prejudiced, by not being allowed to confront and cross-examine this petitioners parole officer, at this petitioners revocation hearing, on September 24, 1992, in that if this petitioner was able to cross-examine this petitioners parole officer, at this petitioners revocation hearing, then this petitioner could have shown that this petitioners parole officers violation report, exhibit C, was inaccerate [sic] and untrue, but without this petitioner being allowed to cross-examine this petitioners parole officer, at this petitioners revocation hearing, on September 24, 1992, the parole board took this petitioners parole officers report, exhibit C, as absolute truth, and this petitioners parole, "liberty", was revoked. Please see exhibit N.

47. That in dealing with the parole boards decission [sic] to rely *"solely"* on the violation report, exhibit C, as the basis for revoking this petitioners parole, the Alabama Criminal Appeals Court has held:

> "But where the only evidence at a revocation hearing was a parole violation report that consisted of information that had in turn been obtained from police reports, the violation

> reports where [sic] held not to have sufficient indicia of reliability.

Hill v State, 350 So.2d 716-18 (Ala.Crim.App.1977)", cited from *Mack v Purkett*, 825 S.W.2d 851, 856 (Mo.banc 1992).

48. That in violating this petitioners parole, the parole board, should not have held that the violation report, exhibt [sic] C, as having indicia of reliability, as it was unsupported, hearsey [sic], bias, and clearly prejudicial against this petitioner, further, with the Missouri Supreme Court, in Purkett, supra, articulating the use of hearsey [sic] evidence, against a parolees right to confront and cross-examine adverse witnesses, through the Missouri Attorney Generals Office, the parole board knew, or should have known, that by revoking this petitioners parole, based "soly [sic]" on an unsuported [sic] violation report, was to deny this petitioner of his minimum due process rights, as mandated in *Morrissey v Brewer*, 408 U.S. 471, 92 S.Ct. 2604 (1972), through the decessions [sic] that were handed down in *Mack v Purkett*, 825 S.W.2d 851 (Mo.banc1992), and, *IN RE CARSON*, 789 S.W.2d 495 (Mo.App.1990), but the parole board revoked this petitioners parole, anyways.

49. That for the Missouri Department of Probation & Parole, to revoke this petitioners parole, based *"solely"* on an unsupported violation report, was to revoke this petitioners parole on hearsey [sic] evidence, and to deny this petitioner his rights, under the confratation [sic] clause, of the 6th Amendment to the Constitution of the United States of America, as the Missouri Court of Appeals has clearly stated:

"Petitioners complaint that he was denied the right to confrtation [sic] and cross-examination is well founded. Petitioner was entitled to confront and cross-examine the person who provided the evidence which resulted in his loss of liberty. By not being afforded that opportunity, petitioner was denied the minimum rights of due process to which he was entitled."

IN RE CARSON, 789 S.W.2d 495, 497 (Mo.App.1990).

50. That this petitioners revocation hearing, on September 24, 1992, was not unlike the revocations, in either *Mack v Purkett*, 825 S.W.2d 851(Mo.banc1992) or *IN RE CARSON*, 789 S.W.2d 495 (Mo.App.1990), where the courts in both those cases adjucated [sic] that the petitioners where [sic] denied their minimum due process rights, because they were not allowed to confront and cross-examine *any* adverse witnesses, at their revocation hearings, and with this petitioner not being told why there where no adverse witnesses, and this petitioner not being allowed to confront and cross-examine this petitioners parole officer, at this petitioners revocation hearing, on September 24, 1992, then this court should adjucate [sic] that this petitioners minimum due process rights were denied to this petitioner as well.

51. That,

> " . . . fundamental liberty is valuable and its termination inflicts a grevious [sic] loss on the parolee, (and) the court concluded in Morrissey that the decission [sic] to revoke parole must be made in comformity [sic] with due process standards. 408 U.S., at 482, 92 S.Ct., at 2600."

cited from *Gagnon v Scaprelli*, 411 U.S. 778, 93 S.Ct. 1756(1973).

52. That by not affording this petitioner with his minimum due process rights, at this petitioners revocation hearing, on September 24, 1992, as mandated in either Morrissey or Scaprelli, supras, and then revoking this patitioners [sic] parole, based *"solely"* on unsupported hearsey [sic] evidence, the parole board caused this petitioners to suffer a grevious [sic] loss of his "liberty", without due process of law, in violation of this petitioners federally protected rights, under the 5th, 6th, and 14th Amendments to the Constitution of the United States.

53. That not only was this petitioner denied his minimum due process rights, at this petitioners revocation hearing, on September 24, 1992, but this petitioner was not even provided with a written statement by the factfinders,

> "as to the evidence relied on *and* the reasons for revoking parole."

Morrissey v Brewer, 408 U.S. 471, 92 S.Ct. 2593, 2604 (1972).

54. That even under the rules and regulations of the Missouri Department of Probation & Parole, in this petitioners handbooklet, entitled, "Rights of Alleged Violator to Preliminary and Revocation Hearing", on page (10), of exhibit J, it states:

> "After the revocation hearing, the Parole Board will supply the alleged violator with a written notice within ten (10) working days setting out their decision. This notice will be sent within ten

(10) working days from the time the decision was made." Please see exhibit J, page 10.

55. That this petitioners exhibits K, L, and M, will show this court, that this petitioner did not recieve [sic] within (20) working days, or even one-hundred and twenty (120) days, a decision from the parole board as to the evidence relied on and the reasons for revoking this petitioners parole, in fact, it took this petitioner the grievance procedure of the Missouri Department of Corrections, and, one-hundred and twenty-one days (121), for this petitioner to recieve [sic] a written statement from the parole board, as to evidence relied on in revoking this petitioners parole, but to this date, this petitioner has not recieved [sic] a written statement from the parole board, as to the reasons for revoking this petitioners parole. Please see exhibits M & N, which this petitioner recieved [sic] on or after January 23, 1993; four months and one day, after this petitioners revocation hearing, on September 24, 1992.

56. That the minimum due process requirments [sic] of Morrissey or Gagnon, supras, clearly require that this petitioner to be provided, with "a written statement from the factfinders as to the evidence relied on *and reasons for revoking parole*, Morrissey, supra, page 2604, and withput [sic] this petitioner being provided with a written ststement [sic] from the parole board, of the reasons for revoking this petitioners parole, this petitioners minimum due process rights where [sic] violated, under the standards as mandated in both Morrissey, and, Scaprelli, supras, and further:

> "There is no place in our system of law for reaching a result of such tremendous consequences without ceremony – without hearing, without effective assistance of counsel, without a ststement [sic] of reasons. Kent v United States, 383 U.S. 541, 554, 86 S.Ct. 1045, 1053, 16 L.Ed.2d 84 (1966)."

cited from *Morrissey v Brewer*, 408 U.S.495, 92 S.Ct. 2593, 2608 (1972).

57. That the spirit of Morrissey, supra, page 2604, is that the entire parole revocation process, should be completed in about two (2) months, as the Supreme Court in Morrissey, supra, has stated:

> "A lapse of two months, . . . would not appear to be unreasonable".

however, from the date in which this petitioner was arrested for alleged parole violation, July 17, 1992, until this petitioner had "finally" recieved [sic] a written statement from the parole board, was well *over six months*, and any time over the two (2) months period, as suggested in Morrissey, supra, should be held to be unreasonable, and in this petitioners situation, a denial of this petitioners minimum due process rights, and esspicailly [sic] so, sence [sic] this petitioner has still not recieved [sic] a written statement from the parole board, for the reasons for revoking this patitioners [sic] parole.

58. That without this petitioner recieving [sic] a written statement from the parole board, concerning this petitioners revocation hearing, and before this petitioners conditional release date of October 16, 1992, this petitioner "thought" that he still retained his mandate conditional release date, on October 16, 1992, however, what

this petitioner found out was, was that this petitioner had lost his conditional release date of October 16, 1992, when this petitioner was brought back to prison and labeled a parole violator.

59. That pursuant with court order and Missouri Laws, this petitioner was sentenced to the Missouri Department of Corrections, on November 8, 1990, for the term of two, 3, 3, year sentences, to run concurrently, and with this petitioner being granted jail time, this petitioners sentence start date, was October 17, 1990.

60. That according to Mo. Rev. Stat., 1992, volume 3, section 558.011:

> 1. The authorized terms of imprisonment, including both prison and conditional release terms, are:
>
> 4. (1) Asentence [sic] of imprisonment for a term of years shall consist of a prison term and a conditional release term. The conditional release term of any term imposed under section 557.036, R.S.Mo., shall be:
> (a) One-third for terms of nine years or less;

61. That this petitioner was sentenced to the Missouri Department of Corrections, for a sentence of three years, and according to Mo. Rev. Stat 558.011, and for this petitioner to serve one-third of his sentence on conditional release, this petitioner would have had to been released from prison, on October 16, 1992, to serve one-third of this petitioners sentence on conditional release, until this petitioners maximum release date of October 16, 1993.

62. That also according to Mo. Rev. Stat., section 558.11, this petitioners conditional release date of October 16, 1992, could be extended up to this petitioners maximum release date of October 16, 1993, by the board of probation and parole, however, before the board could extend this petitioners conditional release date, under subsection 5, of Mo.Rev. Stat. 558.011, the board must be *petitioned:*

> Within ten working days of reciept [sic] of the petition to extend the conditional release date, the board of probation and parole shall conviene [sic] a hearing on the patition [sic]. The offender shall be present and may call witnesses in his behalf and cross-examine witnesses appearing against him . . .

63. That this petitioners exhibits J and O will show that under the policies and practices of the Missouri Department of Probation and Parole, that when an offender is brought back as a parole violator, the inmate is not eligible for conditional release date", and, that this policie [sic] of the Missouri Department of Probation and Parole is enforced by the Missouri Department of Corrections, as exhibit O, clearly shows that when an offender is brought back to prison, "C R date is automatically removed". Please see exhibits J, page 11, and exhibit O.

64. That the respondent will surely argue that this petitioners conditional release date of October 16, 1992, was not taken from this petitioner, until after this petitioner had been revoked by the parole board and pursuant with Mo. Rev. Stat. 558.031, subsection 5, which states:

"If a person released from imprisonment on parole or serving a conditional release term violates any of the conditions of his parole or release, he may be treated as a parole violator under the privisions [sic] of section 217.720, RSMo. If the board of probation and parole revokes the parole or conditional release, the paroled person shall serve the remainder of his prison term . . . "

65. That this petitioners exhibits J and O have shown this court, that the policies and practices of the Missouri Department of Probation and Parole, enforced by the Missouri Department of Corrections, is quite differant [sic] than what is required in Mo. Rev. Stat. 558.031, subsection 5, as Mo. Rev. Stat. 558.031, subsection 5, calls for an offender to be seen by the parole board and that his release be reviewed, pursuant with section 217.720, R.S.Mo., which requires a hearing in conformity with due process, but exhibits J and O clearly show that an offenders conditional release date is taken from that offender, when the offender is brought back to prison and labeled a parole violator, without any type of a hearing or due process of law. Please see exhibits J and O.

66. That this petitioners P, is an institutional face sheet on this petitioner, and in the upper left hand corner, it shows that this petitioners face sheet was "updated" on September 23, 1992, by the Missouri Department of Corrections, one (1) day *before* this petitioner was seen by the parole board for parole revocation, so the respondents argument that this petitioners conditional release date of October 16, 1992, had not been taken from this petitioner until *"after"* this petitioners parole had been revoked by the parole board, and, pursuant with Mo. Rev. Stat.

558.031, 5, is moot, as this petitioner was not seen by the parole board for parole revocation, until September 24, 1992. Please see upper left hand corner of exhibit P, and compare the date, to this petitioners actual revocation hearing, on exhibit D.

67. That this petitioners exhibit Q, is an institutional face sheet, for an inmate that was released from confinement, and as this court will notice, that this inmates institutional face sheet, includes umong [sic] other things, that inmates conditional release date, pursuant with Mo. Rev. Stat. 558.011, 1, 4, (a), and clearly showing that conditional release dates *are* included on institutional face sheets, however, this petitioners institutional face sheet, does not show a conditional release date, at lease one (1) day before this petitioner had seen the parole board for revocation, and this petitioners exhibit R, is another institutional face sheet on this petitioner, which was updated after this petitioner had seen the parole board, and in both face sheets, there is no mention of a conditional release date. Please see exhibits P and R, before and after revocation.

68. That both Mo. Rev. Stats. 558.011 and 558.031 require and mandate, that some form of a hearing is to be conducted, before this petitioners conditional release date, of October 16, 1992, could have been taken from this petitioner, however, this petitioner has submitted to this court, three (3) exhibits, that show under the policies and practices of both the Missouri Department of Probation and Parole, and, the Missouri Department of Corrections, that without a hearing or due process of law, when an offender is "brought back as a parole violator", his conditional release date, is "automatically removed", and for

the two departments to conduct such policied [sic] and parctices [sic], is nothing less then [sic] a direct violation of both Mo. Rev. Stats, 558.011 and 558.031.

69. That this petitioners conditional release date, of October 16, 1992, was taken from this petitioner, in compliance with the unlawful policies and practices of both the Missouri Department of Probation and Parole, and, the Missouri Department of Corrections, *"before"* this petitioner was seen and his parole revoked, by the parole board, without a hearing or due process of law, and in direct violation of this petitioners rights under the 5th and 14th Amendments to the Constitution of the United States.

70. That under the exhaustion doctrine, the respondent will surely argue that this petitioner has not exhausted "all" available administrative and judicial remedies, that where [sic] available to this petitioner, before this petitioner sought relief in the Federal Court, by way of the Writ of Habeas Corpus, however, this can easily be resolved.

71. That this petitioners exhibits K and L, will show this court, that under the policies and practices of the Missouri Department of Corrections, that this petitioner is not able to address any issues, concerning the Missouri Department of Probation and Parole, in the grievance procedure of the Missouri Department of corrections, and as such, administrative remedies are exhausted. Please see the responses on exhibits K and L.

72. That this petitioner has brought his grounds for relief, as stated in this petitioners petition, and herein, to the Circuit Court of Dekalb County, Maysville, Mo. by

way of the Writ of Habeas Corpus, under case no. CV592-126CC, and, in a one-sided hearing, without this petitioner or counsel for this petitioner being present, or allowing this petitioner to reply or respond to the respondents response to the courts show cause order, the Circuit Court of Dekalb County, denied this petitioners petition for Writ of Habeas Corpus.

73. That this petitioner then went to the Missouri Court of Appeals, by way of a petition for Writ of Review, Requesting a Writ of Certiorari, case number, 47416, while describing the grounds of relief, as stated in this petitioners petition and herein, because of the one-sided way in which the Circuit Court of Dekalb county, had denied this petitioners [sic] his rights under Missouri Rules of Court, as described in paragraph 72, herein, while denying this petitioners petition for Writ of Habeas Corpus, and although the Missouri Court of Appeals had requested from the respondent to respond to this petitioners petition, on the day after the respondent had filed his response to this petitioners petition, the Missouri Appeals Court, denied this petitioners petition, without affording this petitioner with the oppertunity [sic], to file a reply, response, amendment or suplamental [sic] pleding [sic], to the respondents response.

74. That this petitioner then went to the Missouri Supreme Court, case number 75670, by way of the Writ of Habeas Corpus, while describing the ground for relief, in this petitioners petition and herein, but again, this petitioners petition for a Writ of Habeas Corpus was denied, without a show cause order being issued, or, even a reason from the court, as to "why" this petitioner [sic]

petition had been denied, however, courts have held that the:

> exhaustion requirment [sic] satisified [sic] when State Supreme Court denied state habeas petition without comment,

see Lewis v Borg, 879 F.2d 697 (9th Cir. 1989); *see also, Justices of Boston Municipal Courts v Lydon*, 466 U.S. 294, 302-03 (1984); and further:

> "Complete exhaustion of State remedies prior to bringing habeas corpus petition was exhausted by special circumstances, including petitioner's continual good-faith effort to bring his petition befors [sic] proper form and states officials' failure to take any action to rectify petitioners predicament. *see, Chitwood v Down*, 889 F.2d 781 (8th Cir. 1989).

75. That in fact, this petitioner had filed a complaint under U.S.C. § 1983, asserting the grounds as stated herein, and although this petitioner speciffically [sic] stated that he was not seeking reliese [sic], as a form of relief, the Honorable William A. Knox, of the central division, asserted that this petitioner must seek relief in the form of a Writ of Habeas Corpus; case number, 92-4554-CV-C-5, and with all being considered, this petitioner has exhausted administrative and judicial remedies, in a good-faith effort.

76. That this court has the jurisdicition [sic] through the Federal Rules of Civil Procedure, to treat this petitioners petition for Writ of Habeas Corpus or this Motion and Request for Final Disposition of this Matter, under the Federal Rules of Civil Prodecure, as a Motion For Summary Judgement, a Judge- [sic] on the Merrits [sic], a

Judgement on the Pleadings, and possibly a statement of claim, for the purposes of a complaint under 42 U.S.C. § 1983, or any other applicable civil rule that this court can use to best serve justice and this petitioners interests, and although this petitioner might be released on August 7, 1993, for the piuposw [sic] of a final adjucation [sic] in this matter, courts have held:

> custody requirment [sic] satisfied when prisoner released on parole after hebeas [sic] petition filed. *see, Gordon v Duran*, 895 F.2d 610-612 (9th Cir. 1990); *see also, Jones v Cunningham*, 371 U.S. 236,243 (1963); *Kolocotroria v Holcomb*, 925 F.2d 278,279-80 (8th Cir. 1991).

77. That this court granted the respondents second request for an extension of time, up to and including July 7, 1993, however, this petitioner did not recieve [sic] the respondents response, until five (5) days after the deadline date of this courts order, and that was on, July 12, 1993.

78. That the respondents have submitted into evidence, respondents exhibits 9, 10, and 11, that this petitioner has *never seen or had knowlegde [sic] of*, until this date, July 12, 1993.

79. That the respondents exhibits 9, 10, and 11, is a revocation report, that was filed [sic] out and submitted to the parole board, by the institutional parole officer, Peggy McClure, for the purpose of the parole board to review in their final decision to revoke this petitioners parole.

80. That the revocation report, respondents Exhibits 9, 10, and 11, is a Revocation Report, that is based on this

petitioners parole officers initial violation report, petitioners Exhibit C, and considering that the respondents Exhibit 9, 10, and 11, is a Revocation Report, based *"solely"* on another report, respondents Exhibits 9, 10, and 11, is entirely hearsay evidence that was presented to the parole board, on September 24, 1992, without this petitioners knowledge of such.

81. That under the minimum due process requirments [sic] in *Morrisey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604, (1992), this petitioner has a *right* to the "disclousure [sic]" of "evidence against" this petitioner, and, right to confront and cross-examine adverse witnesses (unless the hearing officer spacifically [sic] finds good cause for not allowing confratation [sic]), however, respondents Exhibits 9, 10, and 11, was evidence that was submitted to the parole board, at this petitioners revocation hearing, on September 24, 1992, but this petitioner was not informed, nor was respondents Exhibits 9, 10, and 11, disclosed to this Petitioner, at this petitioners revocation hearing to this date, July 12, 1993, this petitioner *has not known* of the existance [sic] of respondents Exhibits 9, 10, and 11, and with the parole board reviewing respondents exhibits 9, 10, and 11 prior to revoking this petitioners parole, without disclosing this evidence to this petitioner for rebuttel [sic], this petitioner was denied his minimum due process rights, under Morrissey, supra.

82. That on page 2 of respondents Exhibit 10, Peggy McClure had stated that this petitioner had admitted to her, that this petitioner had in fact, used cocaine and advised to her, that this petitioner stated, "so what"; this is pure fabracation [sic], as this petitioner did not admit

to Peggy McClure that he had used any type of a drug, let alone cocaine, and, without this petitioner being allowed to confront and cross-examine Peggy McClure at this petitioners Revocation hearing, on September 24, 1992, this petitioner was denied his right to confratation [sic] and cross examining Peggy McClure, to rebutt [sic] any fabracation [sic] that Peggy McClure had submitted to the parole board, and further, Peggy McClure was at F.R.D.C., on the date of this petitioners parole revocation, but this petitioner was not told by the hearing officer, "why" Peggy McClure was not at this petitioners revocation hearing, on September 24, 1992, and as such, this petitioner was denied him [sic] minimum due process rights, under Morrissey, supra.

83. That this petitioner does not want to bring any new grounds up, but with the reciept [sic] of the respondents response to this courts show cause order, this is the first time that this petitioner has had "any" knowledge of respondents Exhibits 9, 10, and 11, and, this petitioner is requesting that respondents exhibits 9, 10, and 11, to be suppressed from the evidence, through the Federal Rules of Civil Procedure, as being hearsay, fabracated [sic] and admitted at this petitioners parole revocation hearing on September 24, 1992, without this petitioners knowledge and in violation of this petitioners minimum due process rights.

84. That in response to the respondents *Statement as to Merits*, on page (5) of the respondents response, the respondent is assertaining [sic] that because this petitioner had signed a waiver of his right to a preliminary hearing on the (2) alleged violations of the conditions of this petitioners parole, in petitioners Exhibits A and B,

that by signing this waiver, this petitioner had made an "admission as to two bases for arrest", which had, "certainly constitutes probable cause for a more detailed parole revocation proceeding." Please see and interrprett [sic] respondents response, page 4 and 5.

85. That it is absured [sic] for the respondent to assert that because this petitioner had signed a waiver, that the waiver constitutes an admission of guilt by this petitioner.

86. That for the purposes of a final adjucation [sic] of this matter, if this court grants this petitioner' [sic] petition for Writ of Habeas Corpus and this motion, a liberal construction, *see Wallace v Lockhart*, 701 F. 2d 719, 727 (8th Cir.) cert. denied, 464 U.S. 934 (1983), that if this court finds that this petitioner has asserted new grounds for relief, or has presented different theories that would be totally unexcetable [sic] for a pro-se litigant, then this petitioner requests that this court, in the best interest of this petitioner, to dismiss such grounds or theories, but hopefully not to totally disregard them, as this petitioner does not know what he is doing or if it is applicable or not applicable, and further, this petitioner is requesting an immediate evedentiary [sic] hearing, so the issues wont [sic] become moot.

WHEREFORE, this petitioner prays that this court will take this petitioners best interest to hart [sic], when adjucating [sic] the matters of this motion and/or this petitioner's petition for Writ of Habeas Corpus, that if appropriate, to order an evndentiary [sic] hearing and/or

to appoint this petitioner with legal counsel, for any possible and/or further proceedings in this matter.

Respectfully Submitted by

/s/ Randy G. Spencer

Randy G. Spencer #176948
Western Mo. Corr. Center,
R.R. 5 Box 1-E, (6-D-150)
Cameron, MO. 64429

CERTIFICATE OF SERVICE

I hereby certify, that a copy of this petitioners exhibits, attached hereto, and the foregoing, was mailed, postage pre-paid, this 13th day of July, 1993, to:

Ronald L. Jergeson, Assistant Attorney General, Pentower Office Center, 3100 Broadway, Suite 609, Kansas City, MO. 64111.

/s/ Randy G. Spencer
Randy G. Spencer Pro-se

EXHIBIT A

(LOGO) STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
BOARD OF PROBATION AND PAROLE
WARRANT

[ ] ENTER_____
JUDGE_____
DOCKET NO _____
[ ] ABSCONDER
[X] NEW OFFENSE
[X] TECHNICAL

TO

NAME TITLE

OR ANY OTHER PEACE OFFICER OF THE STATE OF MISSOURI

ALLEGED VIOLATION OF PROBATION/PAROLE/ CONDITIONAL RELEASE/HOUSE ARREST:

NAME SPENCER, Randy G. NUMBER IN176948

VIOLATIONS:

Violation of Parole Condition #1, by allegedly committing the crime of Rape.

Violation of Parole Condition #6, by alleged possession and use of crack cocaine.

COPY

AUTHORITY

UNDER THE AUTHORITY GRANTED THE BOARD OF PROBATION AND PAROLE OF THE STATE OF MISSOURI AND ITS PROBATION AND PAROLE OFFICER BY SECTIONS 217.720 RSMo, 217.722 RSMo AND BY

ORDER OF THE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS, YOU ARE HEREBY REQUESTED TO ARREST THE ABOVE NAMED INDIVIDUAL AND HOLD HIM/HER SUBJECT TO THE ORDER OF THE COURT HAVING JURISDICTION IN THIS CASE. THE STATE BOARD OF PROBATION AND PAROLE, OR ITS OFFICER ISSUING THIS WARRANT.
MONTH/DAY/YEAR WARRANT ISSUED July 17, 1992

OFFICER NAME AND CODE (TYPE) Jonathan Tintinger 04-07
OFFICE ADDRESS 405 E. 13th St. 5th Fl., Kansas City, Missouri 64106

SIGNATURE OF PROBATION AND PAROLE OFFICER /s/ Jonathan Tintinger

IDENTIFYING INFORMATION

SEX Male RACE White
BIRTH DATE 3-31-56 AGE 36
PLACE OF BIRTH Bloomington, IL.
HEIGHT 5'11" WEIGHT 180 BUILD Stocky
HAIR Blonde EYES Green COMPLEXION Fair
IDENTIFYING MARKS Tattoo on right arm-bowling ball; Upper right arm Randy on a rose

LAST KNOWN ADDRESS 104 So. Kensington, Kansas City, Missouri

LAST KNOWN EMPLOYER All Seasons Car Wash, 8320 Wornall, K. C. MO.

S.S. NUMBER 498-62-6752 FBI NUMBER 77585M5

P.D. NUMBER Alert # 0014239

OFFENSE Burglary II; Stealing Over $150.00

WARRANT TO RETURN:

COUNTY WARRANT SERVED DAY/MONTH/YEAR
WARRANT SERVED

NAME OF ARRESTEE

COUNTY/CITY JAIL WHERE ARRESTEE BEING HELD

DAY/MONTH/YEAR AVAILABLE FOR TRANSPORTATION

SIGNATURE OF SHERIFF/CHIEF OF POLICE BY

(LOGO) STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
REQUEST FOR ILLEGIBLE PRELIMINARY HEARING

INMATE NAME /s/ Spencer, Randy G.
REGISTER NUMBER IN176948
DATE 7-17-92

I have received a copy of the "Right of Illegible Violator to Preliminary and Revocation Hearing" and fully understand my to a preliminary hearing. I hereby [ ] REQUEST [X] WAIVE a preliminary hearing.

SIGNED /s/ Randy Spencer

DATE

WITNESSED BY /s/ Jonathan Tintinger

DATE 7-17-92

NOTICE OF PRELIMINARY HEARING

THIS IS TO INFORM YOU, THAT AT YOUR REQUEST HEARING WILL BE HELD ➤

DATE

TIME LOCATION

THE HEARING OFFICER WILL BE ➤

NAME TITLE

The purpose of this hearing is to determine Illegible probable cause or reasonable grounds exist to refer your case to the Missouri Board of Probation and Parole or to the Court illegible jurisdiction. This Preliminary hearing is NOT a revocation hearing.

The charges brought against you consist of the following violations of the condition(s) of your parole, probation, or conditional release:

PROBATION PAROLE OFFICER

Based on information and evidence plac illegible him, the Hearing Officer will determine if probable cause exists for your to be referred to the authority having jurisdiction.

ELIGIBLE FOR BOND ➤

DATE

PROBATION PAROLE OFFICER/HEARING OFFICE

ADULT INSTITUTIONS
FACE SHEET

REGISTER NO: 176948
COMMITMENT NAME: SPENCER RANDY G

* * PRESENT CONVICTIONS * *

001
CAUSE NO: CR904834 CLASS: C OCN:
MO CODE: 14020990 NCIC: 2299
PG:BURGLARY 2
SENTENCE DATE: 11 08 1990 LENGTH: 003 00 00
SENTENCE COUNTY: JACK RECEIVED: 11 14 1990
JAIL: 0028
SENTENCE START DATE: 10 17 1990
RETURN: 08 25 1992
NON-CREDITED:
MAXIMUM RELEASE: 10 16 1993 MAX: 10 16 1993
DISC TYPE:
CC/CS: REL TO SEQ: SENT STAT: ACTIVE
DISC DATE:

002
CAUSE NO: CR904834 CLASS: C OCN:
MO CODE: 15010990 NCIC: 2399
PG: STEALING OVER $150.00
SENTENCE DATE: 11 08 1990 LENGTH: 003 00 00
SENTENCE COUNTY: JACK RECEIVED: 11 14 1990
JAIL: 0028
SENTENCE START DATE: 10 17 1990
RETURN: 08 25 1992
NON-CREDITED:
MAXIMUM RELEASE: 10 16 1993 MAX: 10 16 1993
DISC TYPE:
CC/CS: CC REL TO SEQ: 001 SENT STAT: ACTIVE
DISC DATE:

Exhibit

The Board Does not allow another inmate PV 8-25-92

to appear as legal Counsel. – /s/ Bill Rudroff

My name is Randy Spencer #176948 and I am to appear before the board on 9-24-92 and I would like for inmate David Grahm (para-legal) here at this institution to be present and my legal counsel at my hearing.

Please aknowledge [sic] receipt of this. Thank you.

P.S. Do you know if I have been charged with a crime?

Sincerely,

/s/ Randy Spencer

MAIL RECEIVED
SEP 21 1992

INST. PAROLE OFFICE
FRDC
STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
INFORMAL RESOLUTION REQUEST

Exhibit K

Log Number 12-01-92-01-08
Date 11-25-92
Inmate Name
RANDY SPENCER
Register Number 176948
Housing Unit 80-2471

COMPLAINT: STATE YOUR PROBLEM BRIEFLY.

I seen the parole board for revocation over (60) days ago and I havn't [sic] received an answer, yet my revocation handbook, page #10 says "the parole board will supply the alleged violator with a written notice with (10) working days setting out their decision. This notice will be sent within (10) working days from the time the decision was made."

I have a right to an answer, regarding the decision of my revocation hearing! I also have been very patient in waiting for a response! However, the board and/or its staff are violating their own rules and policies, in that I was not given an answer, within the (20) day time limit, as prescribed in my booklet.

Mr. Baker, the institutional parole officer, asked me to wait (60) sixty days that is why Ive [sic] waited so long! But I'm tired of waiting, I deserve an answer. I have a right to an answer.

ACTION REQUESTED: STATE REMEDIES YOU ARE SEEKING.

I want a rush effort put into this and I'd like my answer, by the parole board, as to this decision and the evidence or facts relied on.

STAFF USE ONLY

Your complaint is regarding Probation and Parole. This is a non-grievable issue. You are advised to read and follow IS8-2.1.

RECOMMENDATIONS/RESPONSE

IRR is denied.

Investigators Signature
/s/ Jean Ann Johnson — Date 12/10/92

Reviewer Signature
/s/ not legible — Date 12-14-92

Inmate Signature
/s/ Randy Spencer — Date 12-15-92

Exhibit III

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
AND HUMAN RESOURCES
BOARD OF PROBATION AND PAROLE

Date: 01/22/93

INMATE COPY

SPENCER, Randy
176948
WMCC

I. RELATING TO RELEASE CONSIDERATION

___ 1. You have been scheduled for a parole hearing

___ 2. You have been given parole consideration in a parole hearing

___ 3. You have been scheduled for release from confinement. Actual release depends upon continued record of good conduct and an acceptable release plan. The release decision is:

___ Guideline ___ Below Guideline ___ Above Guideline

The reasons for the action taken are:

II. RELATING TO PAROLE/CONDITIONAL RELEASE VIOLATION

Following your violation hearing on 09/24/92, or your waiver of violation hearing, signed by you on / / .

XXX 1. You have been revoked. Your copy of the Order of revocation is attached.

XXX 2. A total of ___ days will not be counted as time served on your sentence, in accordance with Board decision pursuant to state law. Your New Maximum Release date will be .

You have been scheduled for release from confinement on your Maximum Release date of 10/16/1993.

UNITED STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY SPENCER, Petitioner, vs. MIKE KEMNA, Respondent.	)	Case No. 93-0299-CV-W-3-P (Filed Jul. 15, 1993)

ORDER

It is ORDERED that:

(1) petitioner file a reply to respondent's answer, filed July 7, 1993, within thirty (30) days from the date of this Order;

(2) petitioner's failure to do so will result in the dismissal of this case without further notice; and

(3) the Clerk of the Court send petitioner a copy of this Order by regular and certified mail, return receipt requested.

/s/ Elmo B. Hunter
ELMO B. HUNTER
SENIOR DISTRICT JUDGE

Kansas City, Missouri,
Dated: 7-15-93.

NOTICE!!! NOTICE!!! NOTICE!!! NOTICE!!! NOTICE!!!

To the Office of the Clerk,
United States District Court
Western District of Missouri
Writ Division,
811 Grand Avenue
Kansas City, Missouri

RE: RANDY G. SPENCER vs. MIKE KEMNA,
Case No. 93-0299-CV-W-3-P

That the Court issued an Order, date July 15, 1993 where this petitioner was granted and given (30) days to respond to the respondents answer to the Courts Show Cause Order.

This petitioner *is urgently* requesting that your office imform [sic] the Court that this petitioner has already filed his response and that if the Court waits until the (30) day time limit is up, then this petitioner will be denied his rights through a Writ of Habeas Corpus, as by the time the (30) day time limit of this Courts Order of July 15, 1993 is up, this petitioner will be released and out of prison, therefore, it is absolutly [sic] imparative [sic] that the Court be imformed [sic] of this change in this petitioners situation and that he has already filed a response to the respondents answer to the Courts Show Cause Order.

Your time and cooperation in this matter will be greatly appreciated.

Sincerely,

/s/ Randy G. Spencer
RANDY G. SPENCER/
#176948
WESTERN MO. CORR. CTR.
R.R. 5 BOX 1-E
CAMERON, MISSOURI
64429

July 22nd, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY G. SPENCER, Petitioner,	)	Case No. 93-0299-CV-W-3-P
vs.	)	(Filed Jul. 26, 1993)
MIKE KEMNA, Respondent.	)	

PETITIONERS SUPPLAMENTAL [sic] RESPONSE TO THIS PETITIONERS MOTION AND REQUEST FOR FINAL DISPOSITION OF THIS MATTER

Comes now, the petitioner, Randy G. Spencer, pro-se, and in response to this Courts Order of July 15, 1993, this petitioner will state as follows:

1. That on July 15, 1993 this Court gave this petitioner (30) days in which to respond to the respondents answer.

2. That this (30) day time limit is unnecessary, as this petitioner has already filed his response to the respondents answer, by certified mail, exhibit A, with a copy being mailed to this court, on July 13, 1993.

3. That this petitioner would like to supplement his already filed response to the respondents answer, by stating that the respondent, in his answer, page number 8, has admitted that there where no live (adverse) witnesses at this petitioners parole revocation hearing, on September 24, 1992.

THEREFORE, this petitioner prays that this Honorable Court will supplament [sic] this pleading into this

petitioners already filed response to the respondents answer to this Courts Show Cause Order and that this Honorable Court will protect this petitioners rights and the eyes of justice, by adjucating [sic] this matter as quickly as possible, thereby adjucating [sic] a final disposition of this matter.

/s/ Randy G. Spencer

Office of the Clerk
August 13, 1993

Re: Randy G. Spencer v. Mike Kemna
Case No. 93-0299-CV-W-3-P

This is to inform you that I have had a *change of address*. My new mailing address is:

Randy G. Spencer
c/o Robert & Linda Smothers
Lot A-15
Terra Linda Trailor [sic] Park
Warrensburg, Mo. 64093

CERTIFICATE OF SERVICE

I hereby Certify that a copy of the foregoing was mailed, postage prepaid, this 13th day of Aug. 1993, to:

Ronald L. Jergeson, Asst. Attorney Gen. Pentower Office Center, 3100 Broadway, Suite 609, Kansas City, MO.

/s/ Randy G. Spencer
Randy G. Spencer/Pro-se

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY SPENCER, Petitioner,	)	Case No. 93-0299-CV-W-3-P
vs.	)	(Filed Feb. 3, 1994)
MIKE KEMNA,	)	
Respondent.	)	

ORDER

It is **ORDERED** that petitioner's motion for final disposition (Doc. No. 15) is noted. The resolution of this case will not be delayed beyond the requirements of this Court's docket. See *United States v. Samples*, 897 F.2d 193, 195 (5th Cir. 1990).

/s/ Elmo B. Hunter
ELMO B. HUNTER
SENIOR DISTRICT JUDGE

Kansas City, Missouri,
Dated: 2-3-94.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY SPENCER,	)	Case No. 93-0299-CV-W-3-P
Petitioner,	)	(Filed
vs.	)	Oct. 5, 1995)
MIKE KEMNA,	)	
Respondent.	)	

ORDER DENYING PETITIONER'S MOTIONS FOR LEAVE TO PROCEED ON APPEAL IN FORMA PAUPERIS AND FOR A CERTIFICATE OF PROBABLE CAUSE

On August 23, 1995, the court dismissed this habeas corpus case because petitioner is no longer in custody pursuant to the challenged convictions. On September 5, 1995, petitioner filed a notice of appeal and motions for leave to proceed on appeal *in forma pauperis* and for a certificate of probable cause.

Pursuant to 28 U.S.C. § 1915(a), "[a]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith." If the issues sought to be presented are plainly frivolous, the appeal is not taken in good faith. Blackmun, *In Forma Pauperis Appeals*, 43 F.R.D. 343 (1967).

Furthermore, pursuant to 28 U.S.C. § 2253, "[a]n appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding [unless the judge] issues a certificate of probable cause." A certificate of probable cause will be issued only when substantial

questions of law deserving of appellate review are presented. *See, e.g., Barefoot v. Estelle*, 463 U.S. 880 (1983); *Clements v. Wainwright*, 648 F.2d 979 (5th Cir. 1981); *Alexander v. Harris*, 595 F.2d 87 (2d Cir. 1979).

Because this case presents issues which are not deserving of appellate review, it is ORDERED that petitioner's motions for leave to proceed on appeal *in forma pauperis* and for a certificate of probable cause are denied.

/s/ Elmo B. Hunter
ELMO B. HUNTER
SENIOR DISTRICT JUDGE

Kansas City, Missouri,
Dated: 10-5-'95.

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

RANDY SPENCER, Petitioner, vs. MIKE KEMNA, Respondent.	))))))	Case No. 93-0299-CV-W-3-P (Filed Aug. 23, 1995)

ORDER DISMISSING CASE

Petitioner brought this case under 28 U.S.C. § 2254 to challenge the revocation of his parole from concurrent sentences for burglary and stealing. The record shows that petitioner was released from incarceration approximately four months after filing this case, and that he completed service of his maximum term approximately two months later. *See* Doc. No. 13, p. 1, n.1 (State's response). Because the sentences at issue here have expired, petitioner is no longer "in custody" within the meaning of 28 U.S.C. § 2254(a), and his claim for habeas corpus relief is moot.

Accordingly, it is ORDERED that this case is dismissed for the reason stated herein.

/s/ Elmo B. Hunter
ELMO B. HUNTER
SENIOR DISTRICT JUDGE

Kansas City, Missouri,
Dated: AUG 23, 1995

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 95-3629

Randy G. Spencer, Appellant, v. Mike Kemna; Missouri Attorney General, Appellees.	• • • • • • • • •	Appeal from the United States District Court for the Western District of Missouri.

Submitted: May 17, 1996
Filed: August 2, 1996

Before BOWMAN, HEANEY, and WOLLMAN, Circuit Judges.

WOLLMAN, Circuit Judge.

Randy G. Spencer appeals the district court's[1] dismissal of his 28 U.S.C. § 2254 petition as moot. We affirm.

[1] The Honorable Elmo B. Hunter, United States District Judge for the Western District of Missouri.

I.

Spencer was convicted in Missouri state court of felony stealing and burglary and was sentenced to concurrent terms of three years' imprisonment. He began serving his sentences on October 17, 1990, and was paroled on April 16, 1992. Spencer's parole was revoked on September 24, 1992, following a revocation hearing before the Missouri Board of Probation and Parole. The Board revoked Spencer's parole based on a violation report alleging that he had committed rape, used cocaine, and used a dangerous weapon.

Spencer filed this section 2254 petition on April 1, 1993, against Mike Kemna, Superintendent of the Western Missouri Correctional Center, and the Attorney General of Missouri (the State). The petition alleged that: (1) Spencer was denied the right to a preliminary hearing on his parole violations; (2) his conditional release date of October 16, 1992, was suspended without a hearing; (3) his parole revocation hearing violated his due process rights, in that he was denied counsel, he was not allowed to confront adverse witnesses, and the sole evidence against him was the violation report; and (4) he had to wait four months to receive a statement of the reasons why his parole was revoked.

The district court ordered the State to show cause by June 3, 1993, why Spencer's habeas relief should not be granted. The State requested and received two extensions of time until July 7 to file a response. Spencer objected to both motions for extensions of time, stating that the requests for extensions were designed to vex, harass, and infringe upon his substantive rights. The State filed a

response to the show cause order on July 7, arguing that Spencer's claims were procedurally barred, or, alternatively, that the claims should be dismissed on their merits.

On July 14, Spencer filed a motion for final disposition of the matter, arguing that because he could be released as early as August 7, he would suffer irreparable harm if his petition was not decided before that date, in that his petition would become moot and he would have no other way to vindicate his rights. Spencer alleged that the State's motive in requesting extensions was to cause his petition to become moot. He also argued the merits of his petition.

Spencer was released on parole on August 7, 1993, and was discharged from parole upon completion of his sentences on October 16. On February 3, 1994, the district court noted Spencer's motion for final disposition and stated that "[t]he resolution of this case will not be delayed beyond the requirements of this Court's docket." On August 23, 1995, the district court dismissed the petition for habeas relief as moot because the sentences had expired.

Spencer argues on appeal that the district court erred in denying his petition as moot because the court's own delays caused the petition to become moot, he will suffer adverse future consequences due to the denial of the petition, and it is in the public interest to address the merits of his petition. Spencer notes that he is currently incarcerated on unrelated charges and that his prior parole revocation will affect his future chances of obtaining parole.

II.

An attack on a criminal conviction is not rendered moot by the fact that the underlying sentence has expired if substantial penalties remain after the satisfaction of the sentence. *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968). Such penalties include the right to engage in certain businesses, to hold certain offices, to vote in state elections, or to serve as a juror. *Id.* The court will, in fact, presume that collateral consequences stem from a criminal conviction even after release. *See Sibron v. New York*, 392 U.S. 40, 57 (1968); *Leonard v. Nix*, 55 F.3d 370, 373 (8th Cir. 1995). The Supreme Court has held, however, that no similar penalties result from a finding that an individual has violated parole. *Lane v. Williams*, 455 U.S. 624, 632 (1982).

In *Lane*, two defendants pleaded guilty to state court prosecutions without being informed that their negotiated sentences included a mandatory parole term. Both were released on parole and reincarcerated for parole violations, and both filed habeas corpus petitions requesting their release. Both had completed their parole terms by the time the court of appeals entered an order declaring the mandatory parole terms void. *Id.* at 265-30. The Supreme Court determined that the petitions were moot because the petitioners attacked only their sentences, which had expired; they did not attack, either on substantive or procedural grounds, the finding that they violated the terms of their parole. *Id.* at 631, 633.

The Court went on to find that, unlike a criminal conviction, no civil disabilities result from a parole violation finding. The Court stated that "[a]t most, certain nonstatutory consequences may occur." *Id.* at 632. The

Court found that the collateral consequence arising from the possible effect of the parole revocation on future parole decisions was "insufficient to bring this case within the doctrine of *Carafas*." *Id.* at 632 n.13. Relying on the relevant Illinois law, the Court noted that the existence of a prior parole violation did not render an individual ineligible for parole, but was simply one factor among many considered by the parole board. *Id.* at 633 n.13.

We have dismissed a habeas corpus appeal challenging a parole revocation for lack of jurisdiction as moot when the movant was again paroled before the case was orally argued. *Watts v. Petrovsky*, 757 F.2d 964, 965-66 (8th Cir. 1985) (per curiam). We considered as too speculative to overcome mootness the argument that the movant's parole could once again be revoked and the prior parole revocation report used against him. *Id.* at 966.

Spencer first attempts to distinguish *Lane* on the ground that, unlike the petitioners in that case, he attacked not only his sentence, but also the underlying basis of his parole violations. This distinction has been used by courts of appeals in other circuits to overcome mootness in the parole revocation context. *See United States v. Parker*, 952 F.2d 31, 33 (2d Cir. 1991); *Robbins v. Christianson*, 904 F.2d 492, 495-96 (9th Cir. 1990). It must be recognized, however, that the Court in *Lane* went on to hold that the possible collateral consequences in future parole hearings stemming from a finding of parole violation are insufficient to overcome mootness. *Lane*, 455 U.S. at 632-33 & n.13. This part of the Court's holding Spencer cannot overcome.

Spencer attempts to further distinguish *Lane* on the ground that it relies on Illinois, rather than Missouri, law. We find this purported distinction unpersuasive. The Illinois regulations relied upon in *Lane* explicitly provided that the parole board should consider an individual's prior parole violations as a factor in determining whether parole should be granted. *Lane*, 455 U.S. at 639 (Marshall, J., dissenting). Under Missouri statutes and regulations, the Board does not explicitly rely on a prior parole violation even as one factor in its decision regarding whether to grant parole.[2] *Lane*'s holding, therefore, is even more applicable to a case arising under Missouri law.

---

[2] The Missouri statute concerning parole provides, in relevant part:

> When in its opinion there is reasonable probability that an offender of a correctional center can be released without detriment to the community or to himself, the board may in its discretion release or parole such person except as otherwise prohibited by law.

Mo. Rev. Stat. § 217.690.1 (1994).

In addition, the statute provides that "[t]he Board shall adopt rules . . . with respect to the eligibility of offenders for parole." Mo. Rev. Stat. § 217.690.3 (1994).

Pursuant to this section, the board has adopted regulations stating that the reasons for its decisions to deny parole include:

1. Release at this time would depreciate the seriousness of the offense committed or promote disrespect for the law;
2. There does not appear to be a reasonable probability at this time that the inmate would live and remain at liberty without violating the law;
3. The inmate has not substantially observed the rules of the institution in which confined; and

Spencer finally attempts to distinguish his case from both *Lane* and *Watts* on the ground that the collateral consequences of his parole revocation are not speculative as to him, in that he is once again incarcerated and is facing new parole hearings. Although Spencer's possible collateral consequences are not as speculative as those in *Watts*, 757 F.2d at 966, we conclude that they remain too speculative to overcome a finding of mootness. Given the Board's wide discretion in releasing a prisoner on parole, we cannot say that the Board will rely on Spencer's previous parole violation in making its decision. Moreover, Spencer placed himself in his present position, in which collateral consequences stemming from his parole revocation become more likely. As noted of the petitioners in *Lane*, Spencer was "able – and indeed required by law – to prevent such a possibility from occurring." *Lane*, 455 U.S. at 633 n.13.

III.

Spencer argues that his action should not be dismissed as moot because the important public interest in due process in parole revocation proceedings excepts his case from the mootness doctrine. He argues that because of the important public interest, he need not show that he will be personally affected by the outcome.

---

4. Release at this time is not in the best interest of society.

Mo. Code Regs. tit. 14, § 80-2.010(9)(A) (1992).

The regulations explicitly state that a parole violator "can be considered for parole at a later time." Mo. Code Regs. tit. 14, § 80-4.030(4) (1992).

To be excepted from the mootness doctrine, the matter must be " 'capable of repetition, yet evading review,' " and there must be " 'a reasonable expectation that the complaining party would be subjected to the same action again.' " *Lane*, 455 U.S. at 633-34 (quoted citations omitted); *see also DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (per curiam) (although state law may save case from mootness based on public interest, federal courts require litigants' rights be affected). Spencer must show a "reasonable likelihood" that he will be affected by the Board's allegedly unconstitutional parole revocation procedures in the future. *See Honig v. Doe*, 484 U.S. 305, 318 (1988). "[A] mere physical or theoretical possibility" is insufficient to satisfy the test. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982).

We do not find a reasonable likelihood that Spencer will again be affected by the Board's parole revocation procedures. Assuming that Spencer is paroled from his present incarceration, we will not assume that he will violate his parole terms in order to again undergo revocation proceedings. *See Honig*, 484 U.S. at 320 (generally unwilling to assume party will repeat misconduct).

The order of dismissal is affirmed.

HEANEY, Circuit Judge, concurring.

I concur in the result reached by the majority only because I agree we are bound by the United States Supreme Court's decision in *Lane v. Williams*, 455 U.S. 624 (1982). Were I writing on a clean slate, I would reverse the district court because it seems clear that Spencer may suffer collateral consequences as a result of the revocation of his parole.

It is unfortunate that the decision on whether the revocation hearing comported with due process was delayed for so long that the matter became moot by Spencer's release from prison. If nothing else, this case highlights the necessity of making prompt decisions in revocation cases.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-3629WMKC

Randy G. Spencer, Appellant,	*	
vs.	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc
Mike Kemna; Missouri Attorney General, Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 19, 1996

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

SUPREME COURT OF THE UNITED STATES

No. 96-7171

Randy G. Spencer,
Petitioner

v.

Mike Kemna, Superintendent, Western Missouri Correctional Center

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Eighth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

April 14, 1997

No. 96-7171

In The

Supreme Court of the United States

October Term, 1996

RANDY G. SPENCER,

Petitioner,

v.

MICHAEL L. KEMNA and
JEREMIAH W. (JAY) NIXON,

Respondents.

On Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR PETITIONER

INGLISH & MONACO, P.C.

JOHN WILLIAM SIMON
Counsel of Record

DAVID G. BANDRÉ
237 East High Street
Jefferson City, Missouri 65101
(573) 634-2522

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

I. Whether a state attorney general's office and a district court may delay the response and disposition in a habeas corpus action until the petitioner's claim is arguably moot, then rely on the asserted mootness resulting from their delay to deny relief.

II. Whether the court below erred in holding that a habeas corpus petition challenging a parole revocation is "moot," when the petitioner was undisputedly in custody as a result of the revocation when he filed the petition, and when state and federal law render the petitioner liable to testimonial impeachment and sentence enhancement as a result of the revocation.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

CONSTITUTIONAL PROVISIONS

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BRIEF FOR PETITIONER

Petitioner, Randy G. Spencer, prays the Court for its order reversing the judgment of the court below, which affirmed the district court's denial, as moot, of his petition for a writ of habeas corpus.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit appears at 91 F.3d 1114 (8th Cir. 1996). J.A. 131-39. The one-page order of the district court is unreported. J.A. 130.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit entered the judgment to be reviewed on August 2, 1996. J.A. 131-39. Petitioner filed a timely petition for rehearing, with suggestions for rehearing en banc. J.A. 4. That court denied rehearing on September 19, 1996. J.A. 140. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, to the extent it has been invoked in the court of appeals, that: "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . "

Subsection (a) of 28 U.S.C. § 2254 provides, in relevant part, that "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on

the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Local Rule 13.C. of the Rules of United States District Court for the Western District of Missouri provides as follows:

> *Suggestions in Opposition.* Within twelve (12) days from the time the motion is filed, each party opposing the motion shall serve and file a brief written statement of the reasons in opposition to the motion.

STATEMENT OF THE CASE

On June 3, 1992, Randy Spencer was on parole from two sentences of three years for burglary in the second degree and stealing over $150. J.A. 65-70. According to a parole violation report, there was a police report which said that on June 3, 1992, Spencer met a woman at a crack house; that after smoking crack cocaine, she drove Spencer home and went into his apartment with him; and that he raped her, and had her drive him back to the crack house. J.A. 71-76.

On July 16, 1992, officers of the Kansas City, Missouri, Police Department detained Spencer on a "twenty-hour hold" in connection with the alleged rape of the woman from the crack house. J.A. 72. The next day, Spencer's parole officer issued a warrant for his arrest, charging that he had violated two conditions of his parole by committing the crime of rape, and by possessing and using crack cocaine. J.A. 112. The parole officer interviewed Spencer, and tendered him a waiver of a preliminary revocation hearing on the two alleged violations. According to Spencer's undisputed account of the interview, the officer told him that the waiver was "only a formality." J.A. 81. Spencer signed the waiver. J.A. 114.

The parole officer reported that Spencer had been convicted of sodomy in 1983, had received a sentence of imprisonment for five years, and was a "registered sex offender." J.A. 75. Nonetheless, the parole officer recommended that the Board of Probation and Parole continue Spencer on parole pending the prosecutor's decision whether to charge him with raping the woman from the crack house. J.A. 75-76. No prosecutor has charged Spencer with any of the acts the parole officer accused him of committing.

On August 6, 1992, the parole officer issued a report charging Spencer with a third violation of his parole: using a dangerous weapon. The violation report said the police report said the woman from the crack house said that Spencer had "pressed" a screwdriver against her side, but that she "wasn't clear at what point that happened." J.A. 74-75. Spencer did not execute a waiver of a preliminary revocation hearing on this third accusation, nor was he given the opportunity to do so. J.A. 82 (¶ 13).

On August 25, 1992, Spencer was transferred from the local jail to the Department of Corrections. J.A. 67 & 84 (¶ 16). On September 14, 1992, an institutional parole officer told him that his final revocation hearing would be in ten days; that he was responsible for obtaining any witnesses he wanted to call at the hearing; and that he could have one stamp and one telephone call with which to do so. J.A. 84-85 (¶ 19). Relying on a state parole regulation to the effect that persons accused of parole violations "may have a representative of their choice" at the final revocation hearing, Spencer requested the presence of an inmate paralegal at the institution; the Board denied the request. J.A. 117.

At the hearing on September 24, 1992, the State called no witnesses. It presented no "evidence" besides the violation report. At no point was Spencer afforded the opportunity to cross-examine either his accuser or those who reported her out-of-court statements or the person who claimed Spencer confessed to having smoked crack cocaine. On the rape and armed criminal action accusations, the only "evidence" that Spencer had violated the terms of his parole were (1) the out-of-court statements of the parole officer as to (2) the out-of-court statements of unnamed police officers as to (3) the out-of-court statements of Spencer's accuser as to (4) what she recalled happened when she was smoking crack cocaine. On the drug accusation, the only evidence was the parole officer's out-of-court statement that Spencer had admitted smoking the substance – which Spencer denied. J.A. 89-90 (¶¶ 33-34) & 91 (¶ 37).

The Board revoked Spencer's parole, relying on all three of the asserted violations. J.A. 55-56. It expressly based its findings on the initial violation report: "Evidence relied upon for violation is from the Initial Violation Report dated 7-27-92." J.A. 56.

Spencer did not receive a copy of the order revoking parole and setting forth the Board's basis for doing so until four months after the hearing. J.A. 98 (¶ 55) & 117-18. At that time he also received notice that the Board had "automatically" extended his incarceration from his "conditional release" date of October 16, 1992, to his maximum release date of October 16, 1993, *before* the hearing on the revocation – solely on the basis of the violation report. J.A. 99-104, 116 & 119-20. *See* Mo. Rev. Stat. § 558.011.4-5 (Supp. 1992) (defining "conditional release" and prescribing procedure to be followed in extending it). Subsequently the State mitigated the effect

of this action by finding Spencer eligible for statutory "good time," Mo. Rev. Stat. § 558.041 (Supp. 1992), allowing him to be released on parole once more on August 7, 1993. J.A. 50.

Spencer presented his constitutional grievances concerning the parole revocation in habeas corpus petitions before the circuit court of the county in which he was then a prisoner, before an intermediate appellate court, and before the Supreme Court of Missouri. J.A. 8-10, 39, & 104-06. All three courts denied relief.

Three days after the Supreme Court of Missouri denied relief, Spencer executed an application for a writ of habeas corpus from the United States District Court for the Western District of Missouri. J.A. 10 & 16. Spencer raised four grounds for relief:

1. The Board denied him his right to a preliminary revocation hearing on the armed criminal action accusation, in that he had a right to such a hearing and did not waive it as to this additional accusation.
2. The Board denied him a hearing on the cancellation of his conditional release date.
3. The Board denied him the minimum due process rights concerning his final revocation hearing, in that:
   a. It denied him the right to confront and cross-examine any of the witnesses against him, but relied solely on the out-of-court statements in the initial violation report.
   b. It gave him no notice that the entire case for revoking his parole would be the out-of-court statements in the violation report.
   c. It denied him the right to representation by a person of his choice.

> 4. The Board failed to apprise him of the fact of its decision to revoke his parole, and of the evidence it relied on in doing so, for four months, when its regulations required that such a statement be prepared within ten working days of the hearing, and that the parolee be provided this statement within ten working days from the date of the decision.

J.A. 12-14.

On April 1, 1993, the district court filed the application, and consigned the case to the Pro Se Office of the clerk of that court. J.A. 1. On April 5, 1993, the district court directed Spencer to file an affidavit establishing his in forma pauperis status; he did so three days later. Dist. Ct. Doc. Nos. 2-3. Nearly a month later, the district court ordered the respondents to file an answer within thirty days of its order. J.A. 17-18.

On May 1, 1993, an Assistant Attorney General filed a motion for extension of time to file the respondents' answer to the district court's order. J.A. 19-20. The motion recited the following reason:

> That counsel has, within the past weeks, filed numerous responses in federal habeas corpus cases, written and filed numerous briefs, and prepared for and made several oral arguments in the various courts in the State of Missouri. Due to this litigation, respondent has been delayed in the completion of his brief in the above-styled case.

J.A. 19.

Under Local Rule 13.C. of the United States District Court for the Western District of Missouri, Spencer had an initial period of twelve days in which to respond to this motion. Because the respondents' counsel served the motion on Spencer by mail, Spencer had an additional

three days in which to respond. Fed. R. Civ. P. 6(e). Spencer's response was therefore due fifteen days after service of the respondents' motion. Spencer filed his response on June 8, 1993 – a week after the respondents filed their motion. J.A. 1 & 22-25. On June 3, however, the district court had granted the respondents' motion by signing their draft order. J.A. 21.

Respondents' first motion for extension of time had sought, and obtained, an additional twenty-one days. On Day 21, however, a second Attorney General entered his appearance as counsel for the respondents. J.A. 28-29. The same day, he filed a second motion for extension of time – seeking an additional fourteen days. Like his predecessor, the second Assistant Attorney General pleaded:

> That counsel has, within the past weeks, filed numerous responses in federal habeas corpus cases, and has written and filed numerous briefs in the Eighth Circuit Court of Appeals and has prepared for and made several oral arguments in the Eighth Circuit. Due to this litigation, respondent has been unable to complete the response in the above-styled case[.]

J.A. 26. Once more, Spencer filed a timely objection – pointing out that in both instances the successive attorneys for the respondents had waited until the last day to file their motions for additional time, when in fact the generalized reasons they pleaded were, if true, known to them well in advance. J.A. 30-35. The same day, the district court issued a form order granting the extension. J.A. 36.

On the last day allowed for filing an answer – July 7, 1993 – the respondents filed a response noting that "petitioner has been scheduled for parole release on August 7, 1993." Respondents observed, as well, that "petitioner

will complete the service of his entire term of imprisonment on October 16, 1993." J.A. 37 n.1.

A week after the respondents filed their answer, Spencer filed a reply – starting and finishing by calling the district court's attention to the impending date of his release, and to the threat that his grievances would be held moot. J.A. 78-80 & 110. Spencer addressed the respondents' answer by buttressing his petition with exhibits, with discussions of this Court's decisions in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), and with citations to several lower-court decisions applying these precedents. J.A. 78-111.

The day after Spencer filed this pleading, the district court ordered him to file a "reply" to the respondents' response on pain of dismissal. J.A. 121. On July 22 Spencer wrote the district court a letter, and on July 26 he filed a pleading, pointing out that his pleading of July 14 had included a reply to the respondents' response. J.A. 122-25.

On August 7, 1993, the State released Spencer on parole. J.A. 37 n.1. On August 13, 1993, he filed a notice of change of address indicating that he was no longer in prison. J.A. 126. On October 16, 1993, the full term of his concurrent sentences for burglary and stealing expired. J.A. 37 n.1 & 65-67.

On February 3, 1994, the district court issued a one-paragraph order "not[ing]" that Spencer had filed his pleading of July 14, 1993, in which he had sought an adjudication of his parole-revocation claims before he was released on parole again and before his entire sentence had expired. The order recited that "[t]he resolution

of this case will not be delayed beyond the requirements of this Court's docket." J.A. 127.

On August 23, 1995 – over two years and four months after Spencer filed his application – the district court issued a one-page order denying relief. Relying on the respondents' response concerning Spencer's then-forthcoming release on parole, it held that Spencer's grievances had become moot. J.A. 130. On October 5, 1995, the district court summarily denied Spencer's application for a certificate of probable cause – reciting that "this case presents issues which are not deserving of appellate review[.]" J.A. 128-29.

The United States Court of Appeals for the Eighth Circuit granted a certificate of probable cause. By the time of the appeal, Spencer was once more in the Missouri Department of Corrections on an unrelated charge of attempted stealing over $150. Respondents' Brief in Opposition to Certiorari (BIO) at 3. On appeal, Spencer argued, first, that the respondents should not be allowed to avoid his grievances on the ground of mootness, because the respondents' delays contributed to the alleged mootness; second, that Spencer's case fell within an established exception to the principle of mootness where the public interest requires that an issue be decided notwithstanding its apparent mootness in an individual's case; and third, that Spencer's grievances were not moot, because under the facts and circumstances of his case, the past revocation of his parole would make it less likely for him to receive parole consideration again.

The panel of the court below held that under this Court's decision in *Lane v. Williams*, 455 U.S. 624 (1982), the ongoing consequences of Spencer's parole revocation

were "too speculative to overcome a finding of mootness." J.A. 134-37. It found that there was not a "reasonable likelihood" that Spencer would "once again be affected by the Board's revocation procedures." J.A. 138. At no point in its opinion did the panel address the strategic delay grievance which Spencer had repeatedly raised pro se, and which had been appointed counsel's first argument on appeal. J.A. 131-39. In a separate opinion, Senior Judge Heaney characterized it as "unfortunate" that Spencer's claim had been mooted by delays in the district court, and observed that his case "highlights the necessity of making prompt decisions in revocation cases." J.A. 138-39.

Spencer filed a petition and suggestions, seeking rehearing and rehearing en banc. J.A. 4. He emphasized the panel's failure to address the strategic delay issue. On September 19, 1996, the court below denied rehearing and rehearing en banc. J.A. 140.

This timely certiorari proceeding followed.

SUMMARY OF ARGUMENT

This Court has granted certiorari to decide whether a habeas corpus action attacking a parole revocation becomes moot when the petitioner is released on parole again while the action is pending, when the district court's consideration of the petition is delayed through no fault of the petitioner.

In his federal habeas corpus petition, Spencer challenged the State of Missouri's revocation of his parole without affording him the right to a preliminary revocation hearing on the most serious of the accusations against him, and without allowing him to cross-examine any of the witnesses against him. Respondents sought

extensions of time to file their response, and reassigned the case among attorneys, until the petitioner was one month away from being released on parole again. Both parties apprised the district court of Spencer's imminent re-release. It did not render a decision until Spencer had served the *entire sentence* under which he had been on parole when the State initiated the revocation proceedings. The district court then dismissed the action as moot. When Spencer appealed the dismissal, the court below refused to address his grievance concerning the respondents' and the district court's outcome-determinative delay. It held that the prejudice the revocation would cause him in future parole considerations did not overcome the "mootness" the respondents and the district court had created.

I. By delaying this petitioner's case until he had served the entire sentence, the respondents and the district court denied him the right to a remedy that Congress provided him in enacting 28 U.S.C. § 2254.

In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), this Court held that habeas corpus is a state prisoner's "sole federal remedy" for violations of federal constitutional rights affecting the fact or duration of his or her custody. In doing so, it held that state prisoners could not raise such claims under 42 U.S.C. § 1983 without first having litigated them in federal habeas corpus – which requires exhaustion of available, non-futile state remedies.

The lower courts allowed the respondents to delay a federal habeas corpus action involving a constitutional violation in the parole revocation process until after the parolee had served his sentence. This practice leaves a citizen *no* effective federal remedy for the violation of

federal constitutional rights in the revocation of probation or parole.

II. A probation or parole revocation has collateral consequences that defeat a claim of mootness.

In *Carafas v. LaVallee*, 391 U.S. 234 (1968), this Court held that a petitioner's attack on a conviction does not become moot if the sentence expires while the habeas corpus action is pending, when the conviction has "collateral consequences" that give the petitioner " 'a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.' " *Id.* at 237 (internal citation omitted). In *Sibron v. New York*, 392 U.S. 40, 57 (1968), this Court created a presumption that if a prisoner completes his or her sentence while a habeas corpus action is pending, the action is not moot. In *Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985), this Court cited as alternative "collateral consequences" defeating a claim of mootness "the possibility that the conviction would be used to impeach testimony [the petitioner] might give in a future proceeding and the possibility that it would be used to subject him to persistent felony offender prosecution if he should go to trial on any other felony charges in the future."

In Spencer's case, the finding of the Board of Probation and Parole has substantial, non-speculative statutory consequences. In addition to facing the testimonial impeachment and sentence enhancement consequences this Court relied on in *Evitts*, he is subject to Fed. R. Evid. 413, under which the "fact" of the "forcible rape" for which the Board revoked Spencer would be admissible if he were ever charged with a federal sex offense. Under *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), he cannot proceed with an action under section 1983 concerning

this revocation unless he receives a judgment in his favor in the habeas corpus action. Although Spencer need not rely on future parole treatment as a collateral consequence, one need not speculate to conclude that a parole board would take into account a finding it had made – on the basis of its own staff's report – that Spencer had committed two violent felonies while he was at large on parole.

In *Lane v. Williams*, 455 U.S. 624 (1982), this Court declined to apply the *Sibron* presumption to two Illinois petitioners who had been on parole, and who attacked their sentences without attacking either their underlying convictions or the revocation of their parole. Two years after this decision, Congress enacted the Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 2017, which led to the establishment of the Federal Sentencing Guidelines. 28 U.S.C. § 994(a)(1). The court below erred in relying on *Lane* to hold Spencer's action moot, because the facts of his case are substantially dissimilar from those in *Lane*, and because the law affecting the use of probation and parole revocations has changed since that decision.

Allowing the respondents and the district court to delay the disposition of Spencer's federal habeas corpus action until his sentence of incarceration had expired, then holding that his claim is "moot," allows respondents to whipsaw probationers and parolees between section 2254 and section 1983. The effect is to deny them any federal forum for the vindication of federal constitutional rights. Such a result is inconsistent with sections 2254 and section 1983, and with this Court's precedents construing them. The judgment should be reversed.

ARGUMENT

I. A state attorney general's office and a federal district court may not delay a state prisoner's habeas corpus action challenging his parole revocation until his underlying sentence has expired, then defend the dismissal of the action as "moot."

In the first of the two points on which this Court granted certiorari, Spencer demonstrates that this Court's established jurisprudence of federal remedies for federal constitutional violations in the probation and parole revocation process requires that district courts handle such cases expeditiously. Spencer shows that the respondents and the district court have failed to meet this Court's expectations for federal habeas corpus actions. Allowing the respondents to delay their response until a month before they were going to re-parole the petitioner anyway – then holding the petition moot on his discharge from the underlying sentence – denies the petitioner the opportunity for judicial redress that Congress and this Court intended the district court to provide. If the respondents' and the district court's treatment of Spencer's case is not a sufficient ground for reversal, then the Court should *either* hold that the petitioner's claims remain alive after his re-parole and discharge, *or* create an exception to the exclusivity of habeas corpus as a federal remedy for constitutional violations affecting the fact or duration of a person's confinement.

A. *Preiser v. Rodriguez* and its progeny require the district courts to resolve habeas corpus challenges to probation or parole revocations speedily, lest the petitioner be denied any federal remedy at all for federal constitutional violations in respect to the revocation.

In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), this Court held that habeas corpus is the "sole federal remedy" for state prisoners' challenges to the fact or duration of their custody. *Id.* at 499-500. In *Preiser*, three prisoners challenged the denial of "good-time" credits as a result of disciplinary proceedings; they had sought to challenge the denial in an action under 42 U.S.C. § 1983, which would not have required them to exhaust their state remedies. This Court rejected their effort, relying on the capability of federal district courts to process habeas corpus actions more speedily than section 1983 actions: "once a state prisoner arrives in federal court with his petition for habeas corpus, the federal habeas corpus statute provides for a *swift*, *flexible*, and *summary* determination of his claim." 411 U.S. at 495 (emphasis supplied) (citations omitted). It reasoned that once a prisoner has unsuccessfully presented his or her federal claims to the state courts, the federal courts would address these claims speedily:

> Federal habeas corpus . . . serves the important function of allowing the State to deal with the[ ] peculiarly local problems [of corrections administration] on its own, while preserving for the state prisoner an *expeditious* federal forum for the vindication of his federally protected rights, if the State has denied redress.

Id. at 497-98 (emphasis supplied).

Spencer did not challenge the denial of "good time" credits, but the revocation of his parole. This claim is

cognizable in federal habeas corpus. *Morrissey v. Brewer*, 408 U.S. 471 (1972). Because he attacked the fact or duration of his confinement, rather than the conditions of his confinement, *Preiser* left him no other federal remedy.

In Spencer's case, the district court allowed the respondents to delay a response virtually until the eve of Spencer's re-release on parole, then *itself* delayed the case for over two years. When Spencer objected on appeal to the use of this delay as the basis for a finding of "mootness," the court of appeals refused to address the issue. None of this is the performance this Court relied on in *Preiser*.

By granting leave to proceed in forma pauperis and by granting a certificate of probable cause, respectively, the district court and the court of appeals recognized that Spencer had presented one or more non-frivolous claims of Fourteenth Amendment due process violations concerning his parole revocation. No federal court has addressed the merits of his grievances. Neither the district court nor the court below addressed the merits of his grievances because the district court allowed the respondents to delay their answer until a month before Spencer was due for release for good behavior, then delayed its disposition until the sentence had expired. J.A. 37 n.1 & 130.

In moving for enlargements of time adding up to five weeks beyond the thirty days the district court initially allowed them, the respondents' counsel cited no particular facts justifying the delay – even though they should be charged with knowledge of Spencer's impending reparole. *Cf. Griffini v. Mitchell*, 31 F.3d 690 (8th Cir. 1994) (pro se prisoner charged with knowledge of data on corrections department "face sheet" whether or not he received it). In their motions, both of the respondents'

counsel in the district court used substantially the same conclusory boilerplate. It did not allow the district court to confirm their excuses by reference to cases before it and other courts. Respondents gave no reason for reassigning the case from one attorney to another. J.A. 19 & 26-27. Although Spencer filed timely objections to these motions, the district court granted them without waiting for his responses. J.A. 21, 36 & 77.

By allowing the respondents to delay the case until the eve of their re-release of the petitioner, the district court's handling of this claim allowed the respondents to use their official position to secure an outcome in their favor. *See Dr. Bonham's Case*, 8 Co. Rep. 114a (C.P. 1610) (against "common right and reason" for official body to keep half of the fines it imposed for failure to obtain license from it or abide by its charter). *See also Edwards v. Balisok*, 1997 WL 255341, *4 (U.S. May 19, 1997); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927).

Recently the political branches have sought to limit the occasions on which a prisoner may seek relief in federal habeas corpus. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1218 (AEDPA). Even in the recently-limited statutes, no provision suggests that a respondent may delay a response until the eve of a prisoner's release, then rely on mootness as a defense to a non-frivolous federal constitutional grievance. One of the reasons for enacting AEDPA's restrictions on habeas corpus was the concern of *respondents* in habeas corpus actions that prisoners were avoiding the just disposition of their cases by dilatory tactics. When respondents rather than petitioners engage in such conduct, they should not be rewarded. In *Chitwood v. Dowd*, 889 F.2d 781, 784-85 (8th Cir. 1989), for example, the court below excused a Missouri prisoner from

exhausting state remedies when "Missouri state officials . . . disregarded, if not deliberately, at least negligently, the rights of a prisoner who sought the proper execution of his sentence," but who "faced roadblocks at every turn" despite his "continual good faith effort to bring his petition before the proper forum." The court below fails to explain why the result should be different when the delay occurs on a federal court's watch.

B. Neither the respondents nor the lower courts have a right to manipulate federal habeas corpus actions challenging probation or parole revocations so as to deny to probationers and parolees the benefits of the writ of habeas corpus.

In *Young v. Harper*, 117 S.Ct. 1148 (1997), this Court rebuffed an attempt to deny parolees the rights this Court recognized in *Morrissey* by calling their status "pre-parole" when it had only "phantom differences" from the status the Court had addressed in *Morrissey*. Respondents should receive the same response in this case: creating delay by shifting a case around among attorneys, or exploiting delay by the federal court, with the effect that no federal court addresses the merits of the petitioner's claims is just as evasive of the constitutional duties of the respondents as the conduct this Court exposed in *Young*.

In their brief in opposition to certiorari (BIO), at 4-5, the respondents cited an extra-record "study" to the effect that "the mean processing time in federal district courts nationwide for habeas petitions containing more than three grounds is 359 days." From this "fact," the respondents drew the conclusions that "[i]t was impractical to fully litigate petitioner's claim before it became moot . . . ," and "[m]ootness was inevitable." BIO 5.

The bulk of federal habeas corpus petitions are in *no danger* of becoming moot during the time the district courts spend on them. Most federal habeas corpus petitions attack sentences of imprisonment for felonies, in which the petitioner's earliest conceivable release date is well past the time it is likely to take to litigate their habeas corpus action.

Three kinds of federal habeas corpus petitions do *not* fall into this category: those attacking (a) death sentences, (b) extraditions and interstate transfers under the Interstate Agreement on Detainers, and (c) probation and parole revocations. Unlike challenges to sentences of imprisonment, all three of these categories of petitions call for special attention lest the litigation process render the Great Writ a dead letter.

District courts must treat these three categories of habeas corpus actions separately from the mass of such petitions at least where, as here, the petition and the pleadings and correspondence from both sides apprise the district court of the special time considerations. Whereas a stay can adequately preserve the rights of both parties in the execution and interstate transfer situations, only a disposition within the time remaining before the petitioner is re-paroled or discharged can do so in the probation or parole revocation situation: a stay of the petitioner's release would aggravate rather than mitigate the violation of constitutional rights which is at issue.

In the instant case, the district court could and should have resolved Spencer's parole revocation claims before the respondents re-released him. At this point, the least that should be done is to reverse the lower courts' holding of mootness.

C. If there were no right to a disposition of a federal habeas corpus challenge to a probation or parole revocation before the petitioner has served the entire sentence under which he or she was on probation or parole, then the petitioner *should* have a right to challenge the revocation under 42 U.S.C. § 1983, but *does not* have such a right in light of this Court's decision in *Heck v. Humphrey*.

It is neither "impractical" to dispose of such petitions in less than 359 days, nor "inevitable" that district courts will allow them to become moot. In *Preiser* the Court based its refusal to allow prisoners to bring such claims under section 1983 on the federal courts' ability to handle habeas corpus petitions in a "swift, flexible, and summary" or "expeditious" manner. 411 U.S. at 498 & 491.

If Spencer and other citizens whose probation or parole is revoked less than 359 days before their sentences expire have no right to federal habeas corpus relief for federal constitutional violations in the revocation process, then these citizens should be able to proceed to an action under section 1983 without running afoul of *Preiser*. Yet such a development would involve the repudiation of recent decisions expanding on the *Preiser* doctrine.

In *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), this Court held that *Preiser* precluded an action for damages if "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence . . . unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." For a state prisoner, the only federal vehicle for invalidating such custody is an action for habeas corpus. In *Edwards v. Balisok*, No. 95-1351, 1997 WL 255341, at *3-*5 (U.S. May 19, 1997), this Court applied *Preiser* to bar an action for damages

and declaratory relief for the denial of "good time" credits on the basis of a prison disciplinary proceeding. Because the principal due-process violation the prisoner alleged "would, if established, necessarily imply the invalidity of the deprivation of his good-time credits," this Court held that the petitioner's damage and declaratory claims were not cognizable under section 1983.

Spencer's grievance concerning the parole revocation would, if accepted, invalidate the custody flowing from it. Under *Heck* and *Edwards*, a person in Spencer's position could not have raised his claims under section 1983 until after litigating a federal habeas corpus action to oust the parole revocation. Indeed, the court below reads *Heck* to hold that a person in Spencer's position must not only litigate a federal habeas corpus action, but must *prevail* in it, as a "prerequisite" to litigating a section 1983 claim that "hinges on" the same confinement. *Leonard v. Nix*, 55 F.3d 370, 373 (8th Cir. 1995).

Yet once the person has exhausted state remedies, he or she must receive the "expeditious" treatment this Court expected the federal courts to provide, or the immediate confinement flowing from the challenged revocation will have expired. Under the theory that the court below has advanced, if the respondents and the district court delay a prisoner's federal habeas corpus long enough, the prisoner will not only lose his or her remedy under section 2254, but any remedy he or she might have had under section 1983.

Spencer does not believe that this Court would tolerate state or federal officials' whipsawing prisoners – denying them section 1983 relief on the one hand, and habeas corpus relief on the other, with the effect that there is no federal remedy at all for federal constitutional violations in probation or parole revocations. Yet that

would be the effect of the conduct of the respondents and the district court in this case. Either this conduct must stop, or this Court must doubt the continuing validity of *Preiser* and its progeny.

D. Abuses by other prisoners do not justify eliminating Spencer's opportunity to seek federal judicial relief.

As a result of the State's violation of his rights, Spencer has a parole revocation record for forcible rape and armed criminal action based on triple hearsay of a declarant who was voluntarily under the influence of crack cocaine at the time of the alleged events which the intervening declarants say she purported to perceive, recall, and narrate. Spencer did not waive a preliminary hearing on the accusation that gave the alleged parole violation its most ominous legal consequences: using a dangerous weapon. J.A. 82 (¶ 13). Respondents attempt to justify their delay and the district court's by citing more extra-record numbers to the effect that Missouri prisoners have a "litigious nature." BIO-5-6. In light of the undisputed facts of this case, it should come as no surprise – and should be no credit to the respondents – if Missouri prisoners seek federal relief at a higher rate than those in other jurisdictions. This case illustrates why the Framers sought to guarantee to themselves and their posterity the protection of the Great Writ with only the exceptions the Constitution allows. U.S. Const. art. I, § 9, cl. 2.

Even if a large number of prisoner petitions are frivolous or otherwise insubstantial, that is no excuse for causing petitions like Spencer's to become moot through no fault of the petitioner. In *Haley v. Dormire*, 845 F.2d

1498 (8th Cir. 1988), the same prisoner had filed approximately fifty federal complaints before the same district court. When he filed eight more, the district court dismissed them as frivolous without ordering the defendants to show cause or otherwise respond. The court below reversed, holding that a prisoner's *own* record of filing large numbers of lawsuits did not mean that any given future lawsuit was frivolous. In Spencer's case, the time-sensitivity of this petitioner's claims appeared on the face of the petition; both he and ultimately the respondents communicated this sensitivity to the district court. Respondents and the district court cannot point to *other* prisoner's filings to excuse their own treatment of Spencer's application in a manner that they *knew* would deny him many of the benefits the Framers, the Congress, and this Court have intended to flow from the availability of the writ of habeas corpus.

To allow a state attorney general's office and a district court to delay a prisoner's challenge to his parole revocation until his entire sentence has expired, then dismiss his claim and defend the dismissal as "moot," is not the "accepted and usual course of judicial proceedings," but a perversion of these proceedings – delaying justice in order to deny it. Such behavior undercuts the basis of *Preiser v. Rodriguez* by failing to meet this Court's expectation of "expeditious" handling of federal habeas corpus petitions. The court below failed to offer any excuse for the district court's behavior. The judgment must be reversed.

II. Spencer's action did not become "moot" when the respondents re-paroled him and discharged him from his sentence, because he faces serious collateral consequences of the official finding of wrongdoing from which he sought relief.

In the second point on which this Court granted certiorari, Spencer demonstrates, first, that this Court has recognized the collateral consequences of a criminal conviction as keeping a habeas corpus attack on it from becoming moot after the petitioner has served the sentence. These collateral consequences include loss of civil rights, liability to testimonial impeachment, and vulnerability to enhanced sentencing in any future criminal cases. Second, Spencer shows that the same collateral consequences are present in respect to probation and parole revocations. Third, he documents the collateral consequences of *his* parole revocation, which include *additional* collateral consequences such as the applicability of Fed. R. Evid. 413 and the preclusion of an action under section 1983. He shows that *Lane v. Williams*, 455 U.S. 624 (1982), is no obstacle to recognizing his right to proceed with his action, and that the weight of judicial authority applying *Lane* and the absence of legislative action on the issue supports his continued right to relief. Recognizing his continuing right to relief is necessary to prevent respondents and district courts from abrogating the constitutional rights of probationers and parolees.

A. Collateral consequences of criminal convictions suffice to prevent a holding of mootness of federal habeas corpus challenges.

1. Deprivation of civil rights, liability to testimonial impeachment, and eligibility for enhanced sentencing survive a petitioner's release from personal restraint, and give the petitioner a stake in the outcome of a habeas corpus action attacking the original custody that prevents mootness.

In *Carafas v. LaVallee*, 391 U.S. 234 (1968), this Court held that a federal habeas corpus petitioner's claim does not become moot if his or her sentence expires while the action is pending. This Court based its holding in part on the fact that Carafas's criminal conviction imposed "disabilities or burdens" such as a prohibition on engaging in certain businesses, loss of the right to vote, and ineligibility to serve on a jury. *Id.* at 237. These "collateral consequences" give the petitioner " 'a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.' " *Ibid.*, quoting *Fiswick v. United States*, 329 U.S. 211, 222 (1946).

On the basis of the language of section 2254 and the history of the Great Writ, this Court held that the critical time for determining whether the petitioner was "in custody" was when he or she filed the petition: "once the federal jurisdiction has attached in the District Court, it is not defeated by the release of the petitioner prior to the completion of the proceedings on such application." *Id.* at 238. Carafas's sentence expired while he was exhausting his state remedies and otherwise diligently pursuing the vindication of his federal constitutional rights: if he were denied relief because the process had lasted longer than the sentence itself, he would suffer "serious disabilities

because of the law's complexities and not because of his fault. . . . " *Id.* at 238.

In *Sibron v. New York*, this Court held that "a criminal case is moot only if it is shown that there is *no possibility* that any collateral legal consequences will be imposed on the basis of the challenged conviction." *Id.* at 57 (emphasis supplied). Thus, *Sibron* creates a presumption that a criminal conviction has collateral consequences defeating a defense of mootness.

In *Evitts v. Lucey*, 469 U.S. 387, 391 n.4 (1985), this Court gave alternative examples of the collateral consequences that prevent a constitutional challenge to a criminal conviction from becoming moot. In *Evitts*, the petitioner had been finally released from custody, and his civil rights had been restored, but he had not been pardoned. Consequently, this Court held:

> [S]ome collateral consequences of his conviction remain, including the possibility that the conviction would be used *to impeach testimony he might give in a future proceeding* and the possibility that it would be used *to subject him to persistent felony offender prosecution* if he should go to trial on any other felony charges in the future. This case is thus not moot. (Emphasis supplied.)

The collateral consequences the Court had relied on in *Carafas* were absent, but the petitioner had a "substantial stake" in the matter on the basis of testimonial impeachment and sentence enhancement. Although these consequences were "possibilit[ies]" rather than certainties, this Court cited them as sufficient to defeat a defense of mootness.

2. A petition is cognizable after the petitioner's release or discharge from custody so long as the petitioner *filed* it when he or she was subject to personal restraint as a result of the underlying finding of wrongdoing.

In *Maleng v. Cook*, 490 U.S. 488 (1989) (per curiam), this Court considered whether a prisoner was "in custody" under a 1958 conviction and sentence of imprisonment for twenty years, when he had not filed his petition until 1985, after the sentence it attacked had completely expired. This Court held that he was not, and did not consider collateral consequences a sufficient predicate for statutory subject-matter jurisdiction. It distinguished *Carafas* by pointing out that the time at which one must determine the existence of "custody" is the time when the petitioner files the petition. *Compare* 490 U.S. at 490-91 *with* 391 U.S. at 238.

Maleng does not question that collateral consequences suffice to defeat a defense of mootness. It is consistent with *Carafas* and *Evitts*. There is no dispute that Spencer timely filed his petition, and the putative "mootness" resulted from delay by *the same government officials who invoke the defense*. Whether or not the respondents and the district court were at *fault* for delaying Spencer's action until he was re-released on parole and discharged from the sentencing and conviction, the delay was attributable to them rather than to him. Under the reasoning of *Maleng*, they cannot rely on the delay they created to deny a remedy to the petitioner.

As this Court pointed out in *Garlotte v. Fordice*, 115 S.Ct. 1948 (1995), the *Maleng* decision reflected a concern that holding the collateral consequence of sentence enhancement to be a sufficient condition of "custody"

under section 2254 would read that requirement out of the statute: a prisoner could wait his or her entire life to file a petition. 115 S.Ct. at 1951-52. This Court pointed out that its decision in *Garlotte* would do nothing to promote delay, because "the habeas petitioner generally bears the burden of proof," and therefore "delay is apt to disadvantage the petitioner more than the State." *Id.* at 1952.

It serves the legitimate interests of both sides in habeas corpus litigation that this Court does not hold actions moot because through the passage of time or an intervening event, the aggrieved party cannot accomplish all that it would desire. In *Calderon v. Moore*, 116 S.Ct. 2066 (1996) (per curiam), a prisoner won a conditional grant of relief that required the State of California to release him unless it granted him a retrial within sixty days. The State appealed, and the federal courts denied its motions for stay. When it took steps to bring the petitioner to trial again, the Ninth Circuit dismissed the State's appeal as moot.

This Court reversed, reasoning that an appeal does not become moot as a result of an intervening event unless the "court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant," and that "even the availability of a 'partial remedy[ ]' is sufficient to prevent [a] case from becoming moot." 116 S.Ct. at 2067, quoting *Church of Scientology v. United States*, 506 U.S. 9, 13 (1992). Although the State still bore the burden of trying the petitioner while the federal habeas corpus appeal proceeded – and thus could not obtain all the relief it sought on appeal – the Court held that the appeal did not become moot simply because the State could not obtain all the relief it sought.

Here, as in *Calderon*, the aggrieved party cannot receive all the relief to which he was entitled when he

filed his petition: he has already served the remainder of his three-year prison sentence. A writ of habeas corpus cannot be "fully satisfactory." But, as in *Calderon*, the petitioner can still receive "partial relief" in the form of an order expunging the Board's order of revocation and the finding underlying it. One cannot say, therefore, that he cannot receive "any effectual relief whatever."

B. The same factors that keep criminal convictions alive after the release of the petitioner keep probation and parole revocations alive after the re-release or discharge of the petitioner.

Carafas involved a Fourth Amendment challenge to an underlying conviction and sentence. *Id.* at 240. In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court recognized a cause of action – remediable in federal habeas corpus – for constitutional violations in the process of revoking a person's parole. *See also Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation). In a federal habeas corpus action arising under *Morrissey* or *Gagnon*, the specific "custody" to be inquired into is not the underlying judgment and sentence, but the subsequent determination that the petitioner has violated the terms and conditions of his or her probation or parole, and that he or she should be re-incarcerated.

Spencer's case calls for the application of the principle of law in *Carafas* and *Evitts* to the right to a remedy this Court recognized in *Morrissey* and *Gagnon*. Because Spencer faces serious, non-speculative collateral consequences as a result of the official finding of wrongdoing that he sought to attack in the district court, his action is not moot.

C. Under Missouri and federal law, the statutory and other official collateral consequences of Spencer's unconstitutional parole revocation are not speculative, but gravely prejudicial.

Spencer's parole revocation for forcible rape and armed criminal action exposes him to enhanced sentences for a variety of crimes, as well as to impeachment should he be called as a witness in a civil or criminal matter. It exposes him to prejudicial testimony in federal trials under Rule 413. These collateral consequences flow from well-established rules of Missouri law, and of federal law to the extent it is observed in Missouri. Under recent decisions of this Court, Spencer cannot pursue a remedy under section 1983 if the respondents succeed in "mooting" his habeas corpus action.

1. A probation or parole violation renders a person subject to enhanced sentencing under federal and state sentencing statutes and guidelines.

Under subsection 4 of Mó. Rev. Stat. § 558.018 (Supp. 1996), a court of the State of Missouri "shall" sentence a citizen to life imprisonment *with* eligibility for parole but *without* eligibility for *discharge* from parole if it finds that he is a "predatory sexual offender." It provides that forcible rape is one of the prior offenses for such a finding. Subsection 5 defines "predatory sexual offender" to include a person who "[h]as previously committed an action which would constitute an offense listed in subsection 4 of this section, *whether or not the act resulted in a conviction*." (Emphasis supplied.) By its very terms, this enhancement provision is *mandatory* on the sentencing court.

No prosecutor has filed charges against Spencer on the basis of the parole violation report he challenged in the district court. If one *had* done so, and if a Missouri jury had *believed* that Spencer had raped the woman from the crack house; that a screwdriver was a "deadly weapon or dangerous instrument"; and that Spencer had "display[ed]" it "in a threatening manner" during the assumed rape, this additional hypothetical charge would have aggravated the case against Spencer from an unclassified felony to a "class A" felony. Mo. Rev. Stat. § 556.030.2 (Supp. 1992). If the jury had found that a screwdriver was a "dangerous instrument or deadly weapon," and that Spencer had raped the woman from the crack house "by, with, or through the use, assistance, or aid" of the screwdriver, Spencer could also have been convicted of the separate felony of "armed criminal action." Mo. Rev. Stat. § 571.015 (1994).

Missouri law regards the acts of which the Board found Spencer guilty as exceptionally serious. As a "class A" felon, he would have received a sentence of not less than ten years or as long as life imprisonment. Mo. Rev. Stat. § 558.011.1(1) (Supp. 1992). For "armed criminal action," Spencer would have received not less than three years up to life imprisonment, with this term to run consecutively to the term for the underlying felony. Mo. Rev. Stat. § 571.015.1 (1994). Thus, the additional accusation changed Spencer's sentencing exposure from a minimum of five years to a minimum of thirteen years and the potential for two consecutive life sentences.

As a quasi-judicial finding of guilt of forcible rape, this revocation would give the prosecution a prima facie case for subjecting Spencer to a sentence of life imprisonment without eligibility for discharge from parole if he were accused of any of the offenses listed in

subsection 4. These include attempted statutory rape, for which the sentence would otherwise be ten to twenty years. Mo. Rev. Stat. § 557.021.3(1)(a) (1994) (classification of substantive offense), § 564.011.3(1) (1994) (attempts), and § 566.032 (Supp. 1996) (defining and punishing substantive offense).

In Missouri the prosecution can adduce evidence of a parole violation to prove a "substantial history of serious assaultive criminal convictions" in the penalty phase of a capital trial. *State v. Nave*, 694 S.W. 2d 729, 738 (Mo. 1985) (en banc), *cert. denied*, 475 U.S. 1098 (1986). Such "evidence" would be admissible to negate the statutory mitigating circumstance of the absence of a "significant history of prior criminal conduct." Mo. Rev. Stat. § 565.032.3 (1994).

Under the Missouri Sentencing Guidelines, a sentencing judge would have to find that a parole revocation terminated a "substantial period[ ] of crime free living," and would thus eliminate or diminish a mitigating factor. Missouri Sentencing Advisory Commission, *Advisory Sentencing Guidelines Users Manual – 1997* at 18. *See* Mo. Rev. Stat. § 558.019.6 (Supp. 1996) (authorizing Guidelines).

State probation or parole revocations "count" under the United States Sentencing Guidelines. *See, e.g., United States v. Renfrew*, 957 F.2d 525, 526 (8th Cir. 1991) (applying U.S.S.G. § 4A1.1(d) (recency)). In assessing a defendant's criminal history, federal courts may consider allegations of uncharged conduct that is not even criminal, and of criminal conduct concerning which the court or the prosecution dismissed the relevant counts. U.S.S.G. § 1B1.4; *United States v. Snover*, 900 F.2d 107, 109-10 (8th Cir. 1990), *citing United States v. Williams*, 879 F.2d 454, 457 (8th Cir. 1989). If Spencer were accused of a federal crime, the state parole revocation based on triple hearsay from a

crackhead would be part of his Federal Sentencing Guidelines "history."

When a federal court finds that actual convictions do not adequately reflect the seriousness of a defendant's criminal history, the Sentencing Guidelines authorize an upward departure on the basis of "prior similar misconduct established by a civil adjudication or by a failure to comply with administrative orders." U.S.S.G. § 4A1.3. *See United States v. DeFilippis*, 950 F.2d 444, 447-49 (7th Cir. 1991) ("wealth of information" about uncharged conduct in presentence report); *United States v. Keys*, 859 F.2d 983, 989-91 (10th Cir. 1990) (prison disciplinary report). Against this legal background, a zealous federal prosecutor could not help himself or herself if offered the opportunity to introduce the outstanding parole violation report against Spencer.

Because the Federal Sentencing Guidelines apply throughout the country, the federal courts need not involve themselves in considerations of state law in determining the burdens they impose on probationers or parolees who have been revoked, nor evaluate the collateral consequences of probation and parole violations on a case-by-case basis. The *Sibron* presumption applies to these official determinations of wrongdoing, as well as to criminal convictions.

> **2. If a former probationer or parolee who has been revoked is called as a witness, he or she can be impeached with the revocation – to his or her prejudice as a victim of tort or crime, or as a presumptively innocent defendant in a criminal trial, and to the prejudice of third parties or the public in cases where he or she is an occurrence or expert witness who has no personal stake in the action.**

Under Missouri law an opponent may use a probation or parole violation to impeach a witness – including

the defendant in a criminal trial. *State v. Comstock*, 647 S.W.2d 163, 164-66 (Mo. Ct. App. 1983) (probation violation). Under Missouri law, as under the Federal Rules of Evidence, a finding of a parole violation for forcible rape and armed criminal action would be admissible to prove "character or a trait of character" where it is "an essential element of a charge, claim, or defense." Fed. R. Evid. 405(b); *Durbin v. Cassalo*, 321 S.W.2d 23, 25-26 (Mo. Ct. App. 1959) (collecting cases not even involving quasi-judicial finding). The finding would provide a good-faith basis for asking a reputation witness whether he or she was aware that Spencer had had his parole revoked for forcible rape and armed criminal action. Fed. R. Evid. 405(a); *State v. Sweet*, 796 S.W.2d 607, 614 (Mo. 1990) (en banc), *cert. denied*, 499 U.S. 1019 (1991).

Although state evidence law may vary as to the admissibility of probation and parole revocations, the Federal Rules of Evidence provide a basis for admitting these official determinations of wrongdoing throughout the country. Under present law, the considerations of comity and judicial economy that the Court found to justify a presumption of collateral consequences in *Sibron* apply to these determinations as well.

3. Fed. R. Evid. 413 allows the introduction of probation and parole revocations to the former probationer or parolee's prejudice in federal criminal trials.

Under Rule 413, Pub.L. 103-322, 108 Stat. 2136, "[i]n a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant." The rule does

not require that the defendant have been *convicted* of the "previous" offense.

Thus, a probation or parole revocation for a sex offense would be admissible in a federal criminal trial if the probationer or parolee were accused of another sex offense. This new rule has the effect of *branding* a person a sex offender on the basis of any finding such as the Board's, which the district court refused to review because the respondents and the district court itself had delayed his case until his entire sentence had expired.

The Board of Probation and Parole revoked Spencer's parole on the basis of an official finding that he committed two extremely serious crimes of violence, one of which was forcible rape. It made this finding on the basis of triple hearsay about what a declarant experienced while she was voluntarily under the influence of crack cocaine. Under Rule 413, evidence of this revocation would come in even if the petitioner did not testify in his own defense. It is thus a collateral consequence separate from sentence enhancement and testimonial impeachment. Like sentencing consequences under the Federal Sentencing Guidelines, and "character" or "trait of character" evidence admissible under the Federal Rules of Evidence, this collateral consequence applies nationwide. On the basis of this novel collateral consequence, the *Sibron* presumption applies to probation and parole revocations involving sex offenses.

4. Under existing law, preclusion of section 1983 relief is a collateral consequence that even the court below recognized in another prisoner's case.

Spencer is also subject to a collateral consequence flowing from this Court's application of section 1983:

under *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994), a person cannot seek damages under section 1983 for "allegedly unconstitutional conviction or imprisonment, or for other harms caused by actions whose unlawfulness would render a conviction or sentence invalid," unless he or she has first obtained an executive order or a state or federal court judgment (such as a writ of habeas corpus) "invalidat[ing]" the custody. But if Spencer cannot proceed with his federal habeas corpus action because he has been re-paroled and his sentence has expired, he cannot vindicate his federally-protected right to be free from unconstitutional revocation of his parole even by an after-the-fact award of damages.

Spencer has already litigated his claims in the state courts; he *had* to do so under 28 U.S.C. § 2254(b) & (c). Under *Heck*, he cannot receive relief under section 1983 unless he receives relief in federal habeas corpus; but the court below has held that his re-release on parole and the expiration of his sentence have shut him out of federal habeas corpus relief. That means he has *no relief at all* for the violation of his federal constitutional rights.

In *Leonard v. Nix*, 55 F.3d 370, 373 (8th Cir. 1995), the court below recognized that because a prisoner's section 1983 remedy depends on his or her having successfully litigated an attack on his or her custody in order to have a cognizable damages claim concerning it, the effect of denying a habeas corpus petition is *itself* a collateral consequence rendering it non-moot. Leonard challenged his placement in disciplinary detention for fifteen days and his placement on cell restriction for ninety days. *Id.* at 372.

A week before oral argument in the court below, the respondent moved to dismiss Leonard's appeal because he had been released from custody. Leonard replied that

"his separate civil rights damages claim under 42 U.S.C. § 1983 will be foreclosed if the habeas petition is denied." The court below agreed:

> Leonard's section 1983 action gives this case life, for if Leonard wins this habeas action, the state becomes vulnerable to his section 1983 claim. Leonard's petition is therefore not moot.

Id. at 373. *Accord*, *Thompson v. Thalacker*, 950 F.Supp. 1440, 1451-53 (N.D. Iowa 1996).

As in *Leonard*, the threat that the petitioner will receive no federal-court consideration *at all* for the violation of his federal constitutional rights is a collateral consequence precluding a finding of mootness.

Thus, Spencer does not rely on the effect of the Board's 1992 revocation of his parole on the likelihood of his release on parole as defeating the respondents' claim of mootness. Instead, he points to the *lifetime disabilities* of sentence enhancement (under both sentencing statutes and sentencing guidelines), testimonial impeachment, and admissibility of this parole revocation under Rule 413. In addition, under *Heck*, a denial of his habeas corpus action would foreclose his opportunity to seek the only other form of redress that the federal courts offer. Because this Court's post-*Lane* decision in *Heck* is one of federal law that applies generally to section 1983 claims concerning wrongful official detention, the federal courts need not evaluate collateral consequences of probation and parole revocations on a state-by-state or case-by-case basis. The *Sibron* presumption applies.

As a matter of Missouri and federal law, Spencer cannot prevent the Board's revocation of his parole from coming back to affect his legal rights: he is, instead, damned if he does and damned if he doesn't. If he is accused of *attempting* to have what *appeared* to be *consensual* sex with a girl who turned out to be thirteen, he is

subject to being sentenced to life imprisonment on account of the unconstitutional parole revocation for which the lower courts have refused to provide him a day in court. If he is accused of first-degree murder, the prosecution can use this revocation as evidence on the basis of which he could be sentenced to death. If he is charged with a federal sex offense, Rule 413 would allow the Government to introduce this official finding based on triple hearsay from a crackhead to deny him a fair trial.

On the other hand, if Spencer leads a blameless life, but is the victim of a crime or tort, the wrongdoer can – in a variety of circumstances – introduce this parole revocation to discourage the jury from vindicating Spencer's rights as an honest citizen. It requires no "speculation" to arrive at either set of conclusions: it is the law.

D. *Lane v. Williams* is not an obstacle to reversal, in that factual circumstances have changed since this Court rendered its decision in 1982, and Spencer does not *rely* on the collateral consequences that his 1992 parole revocation would have for any future parole consideration.

The court below refused to apply the rule of *Carafas* to a *Morrissey* habeas corpus action, citing this Court's decision in *Lane v. Williams*, 455 U.S. 624, 632 (1982). But *Lane* will not support the decision of the court below.

In *Lane*, two Illinois prisoners, Williams and Southall, sought to challenge their *underlying sentences*, as distinguished from *convictions*, based on pleas of guilty. Their intervening release on parole, revocation, return to custody, re-parole, and complete discharge from custody were *collateral* to their attack on the voluntariness of their pleas. Indeed, the record in *Lane* did not even indicate the

basis of the prisoners' parole revocations. 455 U.S. at 627-28.

In *Lane* neither prisoner contended that the Illinois parole officials had denied him a preliminary hearing on the most damaging allegation his parole officer cited in the violation report, or that the evidence against him was so insubstantial that the most lenient authoritative standards of due process would have precluded its use to revoke a citizen's probation or parole, or that he was not allowed to cross-examine the witnesses against him. This Court recognized this distinguishing fact when it said: "[Williams and Southall] have never attacked, on either substantive or procedural grounds, the finding that they violated the terms of their parole." 455 U.S. at 633.

It acknowledged that if these Illinois petitioners "had sought the opportunity to plead anew," *i.e.*, if they had attacked their *convictions*, "this case would not be moot," because "[s]uch relief would free [them] from all consequences flowing from their convictions. . . . " *Id.* at 630. These petitioners "elected only to attack their sentences," rather than their convictions or their parole revocations. *Id.* at 631. Their sentences were *facts* that had already occurred, and that the courts could not undo; the *official determinations of wrongdoing* in their convictions and in their parole revocations *could* be reversed or expunged. Because these petitioners challenged only the former, their actions were moot.

Unlike the prisoners in *Lane*, Spencer does not question the legitimacy of the term of parole supervision to which the State of Missouri subjected him. Unlike the petitioners in *Lane* – and like the petitioners in *Carafas* and *Evitts* – he challenges the official determination of serious wrongdoing that underlies the sanction he has suffered.

In *Lane*, this Court referred to *Sibron* and *Carafas* as reflecting a common doctrine. 455 U.S. at 631-32. Spencer recognizes the considerations of comity and judicial economy that support the *Sibron* presumption, 392 U.S. at 55-57 (citing cases), and advocates its application to probation and parole revocations as well as to criminal convictions. But he need not ask this Court to go so far in determining the collateral consequences in his case. Whether or not there are *Carafas*- or *Evitts*-class collateral consequences in *every* probation or parole revocation case, there are in *some* – and there certainly are in *his*. Spencer need not rely on the *Sibron* presumption, because he has proof.

In a footnote to this Court's citation of an Illinois case in *Lane*, this Court rejected a dissenting Member's argument, 455 U.S. at 639-40, that Williams's and Southall's cases were "not moot because a possibility exists under state law that [their] parole violations may be considered in a subsequent parole determination." 455 U.S. at 632 n.13. The Court rejected this argument for several reasons, the first of which was that this "possibility" simpliciter was distinguishable from the disabilities the Court cited in *Carafas*. It observed, as well, that "the existence of a prior parole violation does not render an individual ineligible for parole under Illinois law." Spencer does not rely on the effect that the Board of Probation and Parole's finding would have on any future parole consideration, but points to this consequence as only one factor among several. This reasoning from *Lane* is no obstacle to a disposition of this case in this favor.

In any event, it is disingenuous to suggest that when Spencer comes up for parole again, the Board of Probation and Parole will not take into account *its own finding* that Spencer was, in effect, guilty of "class A" forcible

rape and armed criminal action. Spencer's parole officer referred to a prior conviction and sentence in his initial violation report, as well as to the fact (if it is a fact) that he was a "registered" sex offender. J.A. 75. In the context of parole consideration, revocation of a previous grant of parole – on account of the Board's own finding that Spencer had committed forcible rape and armed criminal action *while on parole supervision* – is simply not a "speculative" factor. Yet in light of the other collateral consequences of the Board's finding, this Court need not find such effects to be a sufficient condition of reversing the court below.

In the same footnote to its 1982 decision, the Court also said that the prisoners' parole violation records would not affect their subsequent consideration for parole unless they commit new crimes, which they have a duty to refrain from doing. Three years later, this Court decided *Evitts*, and expressly relied on sentence enhancement as one of two bases for rejecting a defense of mootness even when the prisoner had been "finally released from custody" *and* when the sentencing jurisdiction had restored his "civil rights, including suffrage and the right to hold public office." 469 U.S. at 391 n.4. It was just such civil disabilities that the Court had relied on in *Carafas* when rejecting the defense of mootness. 391 U.S. at 237. In *Evitts*, therefore, this Court adopted sentence enhancement and testimonial impeachment as alternative, sufficient conditions of holding criminal convictions nonmoot after the convicted citizen has served the resulting sentence and has had his or her civil rights restored. Yet in such cases one could argue with equal force that the person could avoid the effect of sentence-enhancement statutes by obeying the law in the first place.

On the basis of the facts before it in 1982, and on the basis of Illinois state law, *Lane* says that "[a]t most, certain non-statutory consequences may occur" as a result of a finding that a person violated the conditions of his or her parole. 455 U.S. at 632. The "non-statutory consequences" to which the Court alluded were employment discrimination and the fact that "the sentence imposed in a future criminal proceeding . . . *could* be affected." *Ibid.* (emphasis supplied). Congress subsequently enacted the Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 2017, which created the United States Sentencing Commission, and directed it to promulgate the Federal Sentencing Guidelines. 28 U.S.C. §§ 991 & 994(a)(1). Congress also adopted Rule 413. When the consequences for sentencing *are* statutory – either by virtue of sentencing statutes such as Mo. Rev. Stat. § 558.018 or by virtue of federal and state sentencing guidelines promulgated under a statute – the language quoted from *Lane* does not apply. It does not mean that Spencer's parole revocation claim is moot when there certainly are *statutory* and common-law consequences identical or analogous to the ones on which *Carafas* and *Evitts* relied. *Lane* rejected the *Sibron* presumption; but Spencer does not rely on it. On the facts of his case, his claim is not moot.

E. The decision of the court below would change the law from what the courts and Congress have accepted since this Court announced its decision in *Lane v. Williams*.

Whereas the disposition Spencer proposes for deciding whether probation or parole revocations have become moot on the probationer's or parolee's release from confinement or discharge from sentence would be *consistent*

with the weight of judicial authority since *Lane*, the decision of the court below would *repudiate* this experience. Such a change in the law would be unfounded as a matter of public policy: Congress has recently reviewed the availability of federal habeas corpus relief, and has not abrogated the dominant authority supporting Spencer's position.

1. The other courts of appeals that have examined the issue of applying *Carafas* and *Evitts* to probation and parole revocations and other official findings of wrongdoing support Spencer's position.

In its opinion allowing the respondents and the district court to run down the clock on Spencer's federal constitutional claims, the court below *acknowledges* that *United States v. Parker*, 952 F.2d 31, 33 (2d Cir. 1991), and *Robbins v. Christianson*, 904 F.2d 492, 495-96 (9th Cir. 1990), would allow a finding of collateral consequences such as the ones in this case to overcome a defense of mootness. J.A. 135.

Respondents sought to distinguish *United States v. Parker*, 952 F.2d 31 (2d Cir. 1991) (per curiam), by arguing that the Second Circuit relied on "New York statutory law" in finding that Parker's federal probation violation was "likely to effect future parole consideration." BIO 7-8. In subdivision II.C. of this brief, Spencer has documented that under Missouri law and federal law, the challenged parole revocation is admissible to his substantial prejudice in a variety of civil and criminal proceedings. Spencer may have occasion to travel to New York or some other state where a past parole revocation from another jurisdiction would have even more damaging effects on his legal rights.

Before the *Parker* court *reached* the specific collateral consequences Ms. Parker faced under *New York* state law, moreover, it rejected the Government's argument that *Lane v. Williams* precluded it from reaching the merits of the petitioner's case. It discussed decisions from the Fifth, Seventh, Ninth, and District of Columbia Circuits applying *Lane*, and concluded that they had viewed as "dispositive" the distinction between attacking only one's sentence, on the one hand, and attacking either the underlying conviction or the probation or parole violation, on the other. *Parker*, 952 F.2d at 33, *citing D.S.A. v. Circuit Court Branch 1*, 942 F.2d 1143 (7th Cir. 1991); *Robbins v. Christianson*, 904 F.2d 492 (9th Cir. 1990); *United States v. Spawr Optical Research, Inc.*, 864 F.2d 1467 (9th Cir. 1988), *cert. denied*, 493 U.S. 809 (1989); *United States v. Maldonado*, 735 F.2d 809 (5th Cir. 1984); and *United States v. Cooper*, 725 F.2d 756 (D.C. Cir. 1984) (per curiam).

In *Parker* the Government appeared to have interpreted this Court's discussion in footnote 13 of *Lane* to mean that a record of parole violations can *never* be a collateral consequence for the purpose of mootness inquiries. The Second Circuit replied:

> In cases where a convict directly attacks his or her conviction or *finding of parole violation*, courts have, as a general rule, considered *a wider spectrum of collateral effects* in deciding whether a case is moot. Thus, potentially negative effects on testimonial credibility, future bail adjustments, future criminal sentences, and potential employment discrimination have been found sufficiently injurious to sustain the vitality of a controversy.

952 F.2d at 33 (emphasis supplied), citing *D.S.A.*, 942 F.2d at 1148-50; *Robbins*, 904 F.2d at 494-95; and *Maldonado*, 735 F.2d at 812-13. Finding that the federal parole violation in

question was "likely to influence the state parole authority to [the prisoner's] detriment," the Second Circuit held that her claim was not moot, and addressed the merits of her attack on the violation. *Id.* at 33-34.

Robbins v. Christianson did not involve a probation or parole revocation, but a prison disciplinary proceeding in which federal corrections officials gave Robbins a conduct violation, transferred him from a halfway house to a prison camp, and denied him sixty days of good-time credit on the basis of a single urine sample they believed to show the use of illegal drugs. They failed to provide him a copy of the conduct violation report until the time to seek administrative review had expired. Robbins filed a federal habeas corpus action, and while the action was pending, he completed the sentence for tax evasion he had been serving at the time of the urine test. The district court dismissed his action as moot. 904 F.2d at 493-94.

The Ninth Circuit acknowledged this Court's holding in *Lane*, and observed that *Lane* did not apply because Robbins was attacking the disciplinary action rather than his underlying conviction or sentence. 904 F.2d at 494-95. Only after reaching this conclusion of law – diametrically opposed that of the court below on the same point – did it consider what collateral consequences would keep a claim alive once a person's sentence has expired.

The Ninth Circuit discussed, first, the effect of an official finding of illegal drug use on the petitioner's sentencing exposure if he were charged with a federal drug offense. It cited the Federal Sentencing Guidelines as "permit[ting] a court to impose more restricted sentences and release conditions on those defendants who have histories of substance abuse." U.S.S.G. § 5B1.4(b)(23) & § 5H1.4. It observed that the Guidelines "permit a court to depart [upward] based on a defendant's involvement

in prior civil adjudications or a defendant's failure to comply with administrative orders." U.S.S.G. § 4A1.3(c). It noted that a prison disciplinary record such as Robbins's could be the basis for such a finding under the Guidelines. 904 F.2d at 495, citing *United States v. Keys*, 899 F.2d at 985, 989-90.

The Ninth Circuit observed that in *Evitts*, this Court had held that a habeas corpus attack on a criminal conviction did not become moot on the expiration of the sentence challenged because the sentence could be used to enhance a later sentence. 904 F.2d at 495-96, citing 469 U.S. at 391 n.4. Accordingly, it reasoned that it was better to examine the petitioner's grievance sooner rather than later. 904 F.2d at 496, *citing Sibron*, 392 U.S. at 56.

Having established a sufficient basis for reversing the district court, the Ninth Circuit also discussed the effect of the revocation on Robbins's employment opportunities. In a single paragraph, it held that it "could not fully discount" this risk. It then returned to the general odium attached to illegal drug use – a factor equally applicable to sentence enhancement and employment discrimination. 904 F.2d at 496.

In *D.S.A. v. Circuit Court Branch 1*, 942 F.2d 1143 (7th Cir. 1991), the Seventh Circuit held that under this Court's decisions, an official act which imputes serious wrongdoing to a citizen is a sufficient collateral consequence to defeat a claim of mootness. *Id.* at 1148-49. *D.S.A.* involved a Wisconsin juvenile adjudication that an eleven-year-old had participated in the murder of a nine-year-old.

The Seventh Circuit quoted *Evitts* for the proposition that liability to impeachment as a witness and to enhanced sentencing suffice to render a conviction non-moot after the convicted citizen has served his or her

sentence. 469 U.S. at 391 n.4. It cited opinions from the Fourth, Ninth, Tenth, and Eleventh Circuits relying on both sentence enhancement and testimonial impeachment as preventing mootness. 942 F.2d at 1149 n.9, citing *White v. White*, 925 F.2d 287, 290 (9th Cir. 1991); *Sanchez v. Mondragon*, 858 F.2d 1462, 1463 n.1 (10th Cir. 1988); *Broughton v. North Carolina*, 717 F.2d 147, 149 (4th Cir. 1983); *Malloy v. Purvis*, 681 F.2d 736, 740 (11th Cir. 1982) (Wisdom, J.), *quoting Harrison v. Indiana*, 597 F.2d 115, 118 (7th Cir. 1979).

The Seventh Circuit noted that under Wisconsin law, the juvenile adjudication "could be used in a presentence report to increase a subsequent sentence." 942 F.2d at 1150. In Missouri, it is the Board of Probation and Parole staff that *prepares* presentence investigation reports. Mo. Rev. Stat. § 217.760 (1994).

The principal case one can cite as *supporting* the decision of the court below is one that *cites it* while recognizing its conflict with *Parker* and *Robbins*. *Lane v. Kindt*, 97 F.3d 1464, 1996 WL 532119 (10th Cir. Sept. 19, 1996) (table). This case involved a challenge to the U.S. Parole Commission's jurisdiction to revoke a federal prisoner's previous order releasing him on parole, when he had already litigated it in federal habeas corpus and lost, then had been re-paroled and revoked again. Without acknowledging the existence of testimonial impeachment, sentence enhancement, Rule 413, or preclusion of section 1983 relief, the Tenth Circuit asserted: "Parole revocation does not have the collateral consequences of a criminal conviction that permit courts to hear a challenge to a conviction after the sentence has expired."

The Tenth Circuit cites *Johnson v. Riveland*, 855 F.2d 1477, 1480-82 (10th Cir. 1988). *Johnson* provides no *precedential* support at all for the Tenth Circuit's position. Like

the petitioners in *Lane v. Williams*, Johnson did not attack *either* a conviction *or* a parole revocation, but the calculation of a *sentence*.

After discussing the defense of mootness, the Tenth Circuit's *Lane v. Kindt* opinion holds that the district court correctly denied the petition as successive. Because it cites the opinion of the court below as a basis for unnecessarily finding a prisoner's claim moot in the face of the contrary authority correctly applying this Court's decisions in *Carafas*, *Lane*, and *Evitts*, the Tenth Circuit's decision is an additional reason for reversing the judgment of the court below.

2. Because the law at the time Congress adopted AEDPA allowed probation or parole revocation claims to proceed on these facts, the enactment of AEDPA implies legislative intent to allow them to do so.

At the time Congress recently revisited the scope of federal habeas corpus jurisdiction under section 2254 in adopting AEDPA, the court below had not issued its decision in this case. The Second, Seventh, and Ninth Circuit decisions Spencer has discussed in this brief – and those of the *other* courts that these decisions cite – *had* construed the statute to allow persons situated similarly to this petitioner to continue litigating timely filed habeas corpus actions even after they had been released from physical custody or otherwise discharged from the immediate restraint that their petitions had challenged.

In interpreting a statute, one presumes that Congress knows the law, including judicial precedent. *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). When Congress

debated and adopted AEDPA, it was on notice that a majority of United States Courts of Appeals – if not *all* of them with published opinions on the subject – had held that collateral consequences such as the ones in this case sufficed to defeat a defense of mootness. If actions such as Parker's, Robbins's, D.S.A.'s, and Spencer's seemed troublesome to Congress – rather than part of the relief it intended to provide in enacting a federal habeas corpus statute – it could have attempted to "correct" the body of law the other circuits have created on the basis of *Carafas* and *Evitts*.

F. Reversal is necessary to deter the knowing denial of a day in court to probationers and parolees who seek redress for federal constitutional violations.

In *Lane v. Williams*, there is no suggestion of bad faith on the part of the respondents or the district court. Respondents' and the district court's knowing delay – as documented in the statement of the case and joint appendix, and as discussed in Spencer's first point – is sufficient to distinguish this case from *Lane*.

Although the facts in this case are egregious, Spencer's situation is far from unique. The practical effect of letting the lower court's decision stand would be that respondents and district courts could avoid decisions enforcing federal constitutional rights of probationers and parolees by running down the clock until their claims become "moot."

Jurisdictions including the United States are steadily requiring prisoners to be imprisoned for greater proportions of the time to which trial courts sentence them. *See, e.g.*, 42 U.S.C. § 13704; Mo. Rev. Stat. § 558.019.3 (1994). As the length of time prisoners are on parole decreases,

the temptation to run down the clock on meritorious constitutional challenges to probation and parole revocations increases. This combination of factors creates an incentive to play fast and loose with the federal constitutional rights of probationers and parolees – like Randy Spencer – whom a crackhead or an enemy turns in for a parole violation, whether or not they are guilty of it.

Allowing official conduct of the type the court below *did not even choose to address* would send a message that if a probationer or parolee is within two and a half *years* of his or her maximum release date, then *Morrissey* and *Gagnon* are dead letters, and the probationer or parolee has no rights the government is bound to respect. That cannot be the law.

CONCLUSION

WHEREFORE, the petitioner prays the Court for its order that the judgment of the court below be reversed, and for such other relief as law and equity indicate.

Respectfully submitted,

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No. 96-7171

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

RANDY G. SPENCER,
Petitioner,

vs.

MICHAEL L. KEMNA and
JEREMIAH W. (JAY) NIXON,
Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

BRIEF FOR RESPONDENTS

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Table of Contents

Table of Authorities

Pages

Cases

Constitutional Provisions

Statutes

Court Rules and Other Authorities

Constitutional and Statutory Provisions

Article III, Section 2 of the United States Constitution states in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States; . . .

Statement of the Case

This case presents the question whether Randy G. Spencer can continue to use a petition for habeas corpus as a means for attacking the revocation of his parole, even though he was reparoled in August 1993 and completed his sentence in October of that year. The Circuit Court of Jackson County, Missouri, sentenced Spencer on November 8, 1990, to concurrent terms of three years imprisonment for burglary and stealing (Joint Appendix, hereinafter J.A. 67-69). The Missouri Board of Probation and Parole placed Spencer on parole on April 16, 1991 (J.A., 71); *see* MO. REV. STAT. § 217.690 (1994) (the Missouri parole statute). This case arose from Spencer's violation of the terms of his first parole.

On July 17, 1992 Parole Officer Jonathan Tintinger issued a warrant for Spencer's arrest for two violations of the conditions of his parole. Condition #1 [1] required Spencer to obey state and federal laws and municipal ordinances and to report all arrests to his probation and parole officer within 48 hours (J.A. 55). Condition #6 required Spencer not to possess or use any controlled substance except as prescribed by a licensed medical practitioner (J.A. 56). Spencer violated condition #1 by committing the crime of rape and violated condition #6 by possessing or using crack cocaine (J.A. 112-114).

Officer Tintinger interviewed Spencer after he was arrested on July 17, 1992 (J.A. 71). Tintinger prepared an initial violation report on July 27, 1992. The report listed three charges -- violation of conditions #1, and #6 as indicated in the warrant, plus a violation of #7 (J.A. 72). Condition #7 barred Spencer from owning or possessing a

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[1] The standard conditions a Missouri inmate must meet to remain on parole are set out at MO. CODE REGS. tit. 14, § 80-3.010.

dangerous weapon (J.A. 56). Tintinger advised Spencer that any statements he made may be included in the violation report, and gave Spencer a booklet entitled "Rights of Alleged Violator." Spencer then waived a preliminary hearing (J.A. 72).[2]

Officer Tintinger's parole violation report was based on his interview of Spencer and on a police report from the Kansas City, Missouri Police Department (J.A. 72). The violation report said that at 6:00 p.m. on June 3, 1992, Spencer received a ride home from a crack house from a woman he met at the house (J.A. 72-73). The woman told the police that she went up to Spencer's apartment after he offered to give her gas money and that the two smoked crack in Spencer's apartment (J.A. 73). The report said that the woman then attempted to leave Spencer's apartment (J.A. 73). The victim said Spencer then pushed her to the floor, got on top of her, and beat her in the face with his fists until she begged him to stop (J.A. 73). Spencer then raped her (J.A. 73). He then directed her to drive him back to the crack house (J.A. 73). The victim told the police that at some point during the rape, Spencer pressed a screwdriver against her side (J.A. 77).

Male occupants of the crack house chased Spencer away after the victim told them about the attack (J.A. 73). She went to the Independence Regional Hospital for rape treatment; the physician's report indicated "bruises on the left side of the mouth with moderate swelling, abrasion of inner upper left lip, tender but not discolored on the right angular jaw" (J.A. 73). Hospital personnel reported the rape, and the Kansas City Police were dispatched (J.A. 73).

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[2] The report does not specify whether the waiver included the violation of condition #7, which was not listed in the violation warrant.

On June 13, 1992, police received an anonymous tip that Spencer was the rapist (J.A. 73). The police showed the victim a six photo spread on June 23, 1992, from which she identified Spencer (J.A. 74). Spencer was detained for questioning on July 16, 1992. He told investigating detectives, "her purse was on top of my refrigerator and I attempted to try to get the dope and pushed her away . . . she fell and landed on my bed" (J.A. 74). When asked if he hit the victim in her head, Spencer replied: "not intentionally not with my knowledge, it may have happened when I pushed her away from the purse" (J.A. 74). Spencer told the police he had consensual sex with the victim (J.A. 74).

At his interview with Officer Tintinger, Spencer had no response to the charge that he committed rape. Spencer admitted smoking crack cocaine. Spencer denied only the third charge: using a screwdriver as a weapon against the victim (J.A. 74-75). Tintinger recommended that Spencer be placed in the Farmington Mineral Area Treatment Center (J.A. 75). He noted that Spencer had previously received a violation for using cocaine on April 2, 1992, at Fellowship House and had used cocaine again within two weeks of his May 21, 1992, discharge from Fellowship House (J.A. 75). Spencer had been convicted of sodomy in 1983 and was a registered sex offender (J.A. 75). Tintinger concluded that Spencer "is obviously a violent and impulsive individual who represents a clear danger to the community" and that "Spencer has every intention of continuing to use drugs whenever possible despite what help is offered him" (J.A. 75). Although Tintinger held in abeyance his ultimate recommendation on violations of conditions #1 and #7, he found it "necessary to immediately remove Spencer from the community" (J.A. 75).

On September 14, 1992, Officer Peggy S. McClure, the parole officer assigned to the institution where Spencer

was sent after his arrest for parole violations, interviewed Spencer and prepared her own report. McClure listed three alleged parole violations and specified that Spencer had waived a preliminary hearing (J.A. 60-61). Spencer again admitted violating condition #6 of his parole by smoking crack cocaine. He again denied violating condition #7, using a dangerous weapon, and now denied violating #1 by raping the victim (J.A. 61-63). McClure found that there was significant reason to believe Spencer had violated the conditions of his parole and recommended revocation. Spencer signed a request for a revocation hearing (J.A. 59-60).

Spencer appeared at a hearing before the Missouri Board of Probation and Parole on September 24, 1992 (J.A. 55). The Board then revoked Spencer's parole (J.A. 55-56). Relying on the initial violation report, the Board found that Spencer had violated conditions #1, #6 and #7 of his parole.

Spencer then challenged the revocation in the Circuit Court of DeKalb County, Missouri; the Missouri Court of Appeals, Western District; and the Supreme Court of Missouri. All of these courts denied relief on Spencer's claims (J.A. 8-9).

The federal court proceedings at issue in this appeal began on April 1, 1993 -- barely more than four months before Spencer received renewed parole, and not much more than six months before the end of Spencer's sentence. On April 1, Spencer filed the habeas corpus petition at issue here under 28 U.S.C. §2254 in the District Court for the Western District of Missouri (J.A. 5). Spencer made four allegations that the revocation proceedings violated his due process rights: he was denied a preliminary hearing on one of the three counts on which his parole was revoked; his conditional release date was moved back without a hearing; his parole hearing was flawed; and he did not receive a timely

explanation of the facts and evidence against him (J.A. 12-14).

Spencer filed his petition on April 1, 1993, though the filing fee did not reach the court until April 15, 1993. At that time, the district court had in hand what it needed to begin action on the petition. On May 3, the district court signed an order directing Respondent[3], Superintendent Mike Kemna, to file within 30 days an answer to the petition for habeas corpus (J.A. 17). The respondent later requested and was granted extensions of time. The first, until June 23, 1993, was sought because Respondent's assigned counsel had been delayed by the preparation of numerous responses and briefs and several oral arguments (J.A. 19). The motion for extension was not meant to vex or harass Spencer or to infringe on his substantial rights (J.A. 19-20). The motion for extension was granted on June 3, 1993. Spencer filed objections to the extension motion on June 8, 1993, accusing counsel of negligence and of lying to the court (J.A. 22-25).

On June 23, 1993, Respondent requested an additional 14-day extension of time until July 7, 1993, again because counsel had been delayed by responding to numerous federal habeas corpus petitions, writing and filing several briefs in the court of appeals, and preparing for and making several oral arguments in the court of appeals (J.A. 26-27). On June 30, 1993, Spencer filed an objection to the second request for extension of time (J.A. 30). Again, he questioned the truthfulness of the reasons given (J.A. 30-35). This motion for extension was granted on June 30, 1993 (J.A. 36).

Respondent filed a timely answer to the district court's

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[3]The attorney general of Missouri and the superintendent of the institution where petitioner is confined are now nominal respondents. These parties will be referred to as Respondent.

show cause order on July 7, 1993 (J.A. 37). The response argued that Spencer's admitted waiver of a preliminary hearing on two of the three conditions of his parole satisfied the requirement for a preliminary hearing and that the record showed that Spencer had waived a preliminary hearing (J.A. 41). It argued that Spencer's complaint about the determination of his conditional release date was a state law issue best left to the state courts (J.A. 42). The response argued that at his parole hearing petitioner was afforded all the process he was due under the circumstances (J.A. 44-45). The response informed the court in a footnote that Spencer was scheduled for release on parole on August 7, 1993 and that he would complete his sentence on October 16, 1993 (J.A. 37-38).

On July 14, 1993, Spencer requested "final disposition of his case," arguing that relief through habeas corpus would not be available after his release on parole on August 7, 1993 when, Spencer believed, the case would become moot (J.A. 78-79). Apparently while that request was en route to the district judge, the court on July 15, 1993 entered an order requesting Spencer to reply to respondent's answer within 30 days (J.A. 121). *See* 28 U.S.C. § 2248. On July 22, 1993 Spencer wrote a letter to the clerk of the court informing the clerk that his "request for final disposition" contained his response to Respondent's answer. Spencer reiterated that because of his pending release, habeas relief would not be available by the time 30 days had expired (J.A. 122-123). Spencer filed a supplemental response on July 26, 1993, adding the allegation that the respondent admitted that no live witnesses adverse to Spencer were called at the parole hearing (J.A. 124-125).

Spencer was released on August 7, 1993, and his sentence expired on October 16, 1993. On February 3, 1994, the district court issued an order taking notice of Spencer's motion for final disposition and stating, "The resolution of

this case will not be delayed beyond the requirements of this Court's docket. *See United States v. Samples*, 897 F.2d 193, 195 (5th Cir. 1990)." (J.A. 127). The district court dismissed the case as moot on August 23, 1995, because Spencer was released from incarceration approximately four months after filing his case and completed his maximum term of imprisonment approximately two months later (J.A. 130).

On September 5, 1995, Spencer filed a notice of appeal. On October 5, 1995, the district court denied an application for a certificate of probable cause (J.A. 128). The United States Court of Appeals for the Eighth Circuit granted a certificate of probable cause on November 16, 1995 (J.A. 2).

In his brief to the court of appeals, Spencer alleged that the district court should have considered his case on the merits. Spencer argued that it was the fault of Respondent and the district court that the case became moot and that the case should be remanded for a hearing on that issue (Brief of Appellant in the court below; henceforth App. 8th Cir. Br. 17-21). He then argued that mootness should be disregarded because of a public policy exception to the mootness doctrine (App. 8th Cir. Br. 21-33). Finally, he argued that his petition was not moot after all because his future release on parole from a new conviction would be affected by the additional blemish on his record created by the parole violation (App. 8th Cir. Br. 33-35). Although Spencer argued that any possible consequence of his revocation should defeat mootness, he identified no specific consequences except that hypothetical effect on future parole consideration (App. 8th Cir. Br.).

Respondent pointed out that this Court's decision in *Lane v. Williams*, 455 U.S. 624 (1982), defeated both

petitioner's argument that he fit within an exception to the mootness doctrine and his argument that his petition was not moot because of the collateral consequence Spencer alleged (Respondent's Brief in the court below; henceforth Resp. 8th Cir. Br. at 6-8). Respondent also pointed out that the time required for the actions of Respondent to answer and for the district court to take up Spencer's case were reasonable in light of the large caseloads in federal courts in Missouri, and that the time required to act on Spencer's claim was not out of line with the nationwide average time for resolving habeas corpus petitions. Respondent further pointed out that even if the case had been decided by the district court prior to petitioner's release it would have become moot on appeal and that there was no justification for moving petitioner's case ahead of the other litigants who also believed their cases merited the attention of Respondent and the district court (Resp. 8th Cir. 6-10).

On August 5, 1995, the court of appeals affirmed the district court's decision (J.A. 131-139). The court recognized the rationale of courts of appeals in other circuits that distinguished *Lane v. Williams* (J.A. 135). The court below, however, held that *Lane v. Williams* must be applied to Spencer's case:

> It must be recognized, however that the court in *Lane* held that the possible collateral consequences in future parole hearings stemming from a finding of parole violation are insufficient to overcome mootness [citation omitted]. This part of the Court's holding Spencer cannot overcome.

(J.A. 135). Missouri law, the court noted, places even less emphasis on a past parole revocation in considering reparole than did the Illinois parole regulations considered in *Lane*. If

the consequence to Spencer was less speculative than the consequence in *Lane*, it was only because Spencer had already reoffended and been convicted again of a new crime -- which was entirely Spencer's fault (J.A. 137). The court also rejected the argument that Spencer's case should be found to fit within a public policy exception to the mootness doctrine (J.A. 138).

In a concurring opinion, Judge Heaney agreed that the court was bound by this Court's decision in *Lane v. Williams*, but said that if he were writing on a clean slate, he would reverse (J.A. 138-139).

Spencer filed a petition for writ of certiorari with this Court alleging that the court of appeals failed to address delays that were the fault of Respondent and the district court, and that the existence of such delays demanded exercise of this Court's supervisory power (Certiorari Petition; henceforth Cert. Pet. 14-18). Spencer also alleged that a conflict existed among the circuit courts of appeals on the correct interpretation and application of *Lane v. Williams* (Cert. Pet. 19). Spencer confined his claimed injuries from having his parole revoked to the one that he cited to the court of appeals: the possibility, as in *Lane*, that the revocation would adversely affect his consideration for parole on a new sentence (*see* Cert. Pet. 19-21).[4]

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[4]Although it is not part of the record before the federal courts, pursuant to the continuing duty to inform the Court of any development that may affect the outcome of the case Respondent states the following: Randy G. Spencer is scheduled for parole on his current seven-year sentence on January 24, 1999, and as a condition of this parole he will be subjected to electronic monitoring until the expiration of his sentence on May 24, 2001. This scheduled parole date is dependent on his continued good conduct and an acceptable release plan.

Summary of Argument

Under this Court's precedents, most specifically *Lane v. Williams*, 455 U.S. 624 (1982), the writ of habeas corpus is available under the Constitution and 28 U.S.C. § 2254 to challenge a parole revocation only until the parolee is reparoled or, at the latest, until his sentence expires. The petitioner here, Randy G. Spencer, asks the Court to change that rule. He proposes the unprecedented step of placing parole revocations on the same footing with criminal convictions. In the alternative, he asks that the Court adopt a rule that would require lower courts to give the highest priority to deciding habeas petitions brought by those who will shortly be released without judicial intervention. The Court should reject both options.

The doctrine of mootness, which forms the basis for limiting the life of habeas petitions challenging parole revocations, is the practical result of the decision of the drafters of the Constitution to limit federal court jurisdiction to "cases or controversies." Thus this Court has repeatedly held that "Article III of the Constitution of the United States limits the federal judicial power to 'Cases' or 'Controversies' thereby entailing as an irreducible minimum that there be (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct and (3) likelihood that the injury will be redressed by a favorable decision." *United Food and Commercial Workers v. Brown Group*, 116 S.Ct. 1529, 1533 (1996). A party seeking to invoke the power of the federal courts to adjudicate a case "must prove an injury fairly traceable to the . . . allegedly unlawful conduct and likely to be redressed by the requested relief." *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992). It is obvious that granting a writ of habeas corpus would redress ills being suffered by petitioners who are still in custody. It is nearly as apparent that the writ, as a vehicle for removing the civil

disabilities that necessarily result from a conviction, can redress the ills of petitioners who are challenging their criminal convictions. But what is at issue here is whether granting the writ sought by Spencer – who was released from custody shortly after his petition was filed, and who is not challenging his conviction – meets the constitutional standards for federal court jurisdiction. Under *Lane v. Williams*, it does not.

Spencer's petition for writ of habeas corpus alleged that the procedures used in a state parole revocation hearing did not comply with the requirements of the due process clause. Spencer was reparoled approximately four months after filing his petition for habeas corpus; he completed his maximum term of imprisonment approximately two months later. Then, because resolving his disagreement with the state over the process of his revocation would no longer meet the requirements of the "case or controversy" requirement, the United States District Court dismissed his habeas corpus action as moot (J.A. 130). The district court followed *Lane v. Williams*, where this Court rejected the idea that the possibility of a future injury from a parole revocation is enough to prevent a case from becoming moot. The Court thus distinguished parole revocations from criminal convictions. A criminal conviction necessarily results in civil disabilities, as this Court recognized in *Sibron v. New York*, 392 U.S. 40 (1968). A parole revocation does not have comparable results.

In his brief to the court below, Spencer could identify only one hypothetical future event as a "civil disability" that could justify continued consideration of his habeas petition even under the rationale of *Sibron*: the possibility that having been convicted of another crime, his past parole revocation could affect his chances of parole from his new sentence. But this Court rejected that very proposition in *Lane v.*

Williams. There is a considerable gap between the civil disabilities that form the basis for the *Sibron* rule (*e.g.*, losing the right to vote or hold office), and the speculative possibility that Spencer and *Lane* presented. Spencer's assertion was that he has committed and been convicted of another crime, he will become eligible for parole, and that the presence of a prior revocation on his record will affect whether he will be paroled. The court of appeals, following *Lane*, found the remote likelihood of such a scenario to be insufficient to create jurisdiction to review Spencer's underlying claim. The Eighth Circuit declined to follow the lead of other circuit courts of appeals, which had overlooked the remoteness and uncertainty of the alleged results of parole violations and found them to be equal to the civil disabilities that result from a criminal conviction. Because the gap between the results of criminal convictions and of parole revocations is real and substantial, the decision of the Eighth Circuit should be affirmed.

Recognizing that this Court dealt adversely in *Lane* with the single alleged injury he cited to the court of appeals, Spencer now belittles his reliance on that alleged ill and adds several other effects that, he claims, were sufficient to create jurisdiction permitting review by the district court. These were the possibility of enhanced sentencing for future state or federal convictions, the possibility of future impeachment, the possibility that Spencer may be tried in federal court for a future sexual assault where the revocation would be admissible as substantive evidence, and that Spencer would be precluded from bringing a civil rights claim under 42 U.S.C. §1983 without first filing a successful habeas petition.[5]

[5] Since Spencer's petition for certiorari alleged only the injury raised in the court below, this is respondent's first appropriate opportunity to point out the expanded basis on which Spencer seeks to establish jurisdiction.

Because Spencer did not present any of these injuries in his brief to the court below in order to meet his obligation to establish jurisdiction, he may not now raise these alleged injuries in this Court. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362-363 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970).

Even if Spencer had timely raised these additional claims, they would be inadequate to create jurisdiction for review. Many of them are based on misreadings of the law. All of them are either too speculative to be injuries in fact, or are not tied to the only challenged conduct, the alleged inadequacies in the parole revocation hearing process. Thus, when explaining his alleged injuries, Spencer repeatedly refers to the underlying charges of rape and drug use. Yet, a decision on Spencer's petition would affect only the parole revocation and not the underlying charges that he finds to be so troubling. Allowing those challenging parole revocations, not criminal convictions, to use the kind of possible future effects that Spencer lists for purposes of deferring mootness under an extension of *Sibron* would constitute a radical change in the scope of the habeas remedy. That is particularly true for Spencer's broad assertion that continued federal court jurisdiction could be justified by the possibility that the act complained of might somehow be used to impeach his testimony.

Spencer also argues that because of the particular facts of his case, mootness should be excused. In fact, Spencer makes a general argument that mootness should be excused in challenges to parole revocations because some litigants will otherwise not have a federal forum in which to pursue their claims. But in light of the decisions of this Court firmly establishing that there is no constitutional right to a federal forum for review of habeas petitioners' claims, and the absence of any authority for Spencer's claimed exemption

from the mootness doctrine, that argument makes no sense here. The petitioner had his claims heard by three state courts but disagrees with the outcome of these proceedings. Despite that disagreement he was released on parole again four months after filing his petition in the district court. His case justifies neither a wholesale modification of the mootness rule, and the resulting increase in the courts' workload, nor the creation of an exception to address his allegedly unique claims, and the resulting need to address in the mootness analysis the particular situation presented by each habeas petitioner challenging a parole violation.

Citing his alleged need for a federal forum, Spencer presents an alternative to modifying the mootness rule: imposing on the federal courts a requirement that his (and, presumably, every) habeas petition be decided before it can become moot. He does not explain how such a rule could be implemented. Nor, critically, does he explain how it could be fair to other litigants -- particularly to those prisoners whose petitions would be given lower priority because their sentences had years, rather than months, left to run.

The district court and the respondent acted reasonably in responding to Spencer's habeas corpus petition. Though the respondent sought and received from the district court two extensions of time, the petition was briefed and ready for decision approximately three months after the petition and the necessary accompanying documents were in the hands of the district court. Spencer was released on parole less than a month later, and his maximum sentence expired approximately two months after that. Spencer has pointed to nothing that would show that between the day he completed the filing of his petition and the end of his sentence, either the district court or the respondent did anything but what the rules of reason and justice required them to do. His case does not present a justification for a new and unworkable rule of judicial management requiring all federal courts to give

dramatically expedited treatment and priority to deciding petitions filed by those prisoners whose release is most imminent.

ARGUMENT

I. The alleged consequences of a parole revocation identified by Spencer are not the kinds of resulting civil disabilities that create a constitutionally recognizable "case or controversy" such that the federal courts can retain jurisdiction over his claims after his sentence has been completed.

A. The rule in *Lane v. Williams*, which precludes one challenging the revocation from demanding the courts' attention after his unconditional release, is mandated by the "case or controversy" requirement of Article III.

Petitioner Spencer asks this Court to limit the impact of an important constitutional rule: the declaration in Article III, Section 2 of the United States Constitution that a case or controversy must exist in order for a federal court to have jurisdiction to review a claim. The minimum requirement for the existence of federal jurisdiction is 1) an injury in fact; 2) a causal relationship between the injury in fact and the challenged conduct; and 3) likelihood that the injury will be redressed by a favorable decision. *United Food and Commercial Workes v. Brown Group*, 116 S.Ct. 1529, 1533 (1996). In *Lane v. Williams*, 455 U.S. 624 (1982), this Court set forth how that test applies to the consequences of a parole revocation if the petitioner has been released from custody while a habeas corpus petition is still pending. Spencer asks the Court to disavow its declaration in *Lane* and allow him--four years after he was reparoled and his sentence expired--to use a petition for writ of habeas corpus to challenge procedures used in revoking his parole in 1992.

The three-element test for jurisdiction was further explained in *Northeastern Florida Chapter of the Associated*

Gen. Contractors of Am. v. City of Jacksonville, Florida, 508 U.S. 656, 663-664 (1993). There the Court referred to the "long line of cases" addressing the "case or controversy" requirement and elaborated on three elements a party must prove to retain federal court jurisdiction:

> (1) "injury in fact," by which we mean an invasion of a legally protected interest that is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical," *Lujan, supra*, 504 U.S., at 560 [*Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)] (citations, footnote, and internal quotation marks omitted); (2) a casual relationship between the injury and the challenged conduct, by which we mean that the injury "fairly can be traced to the challenged action of the defendant," and has not resulted "from the independent action of some third party not before the court," *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976); and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative," *Allen v. Wright, supra*, 468 U.S., at 752. [*Allen v. Wright*, 468 U.S. 737 (1984)].

The Court held that those three elements are the "irreducible minimum" for federal jurisdiction. *Id.* (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)).

Parties seeking to invoke jurisdiction must prove that their claims meet this "irreducible minimum" test. *See*

Franklin v. Massachusetts, 505 U.S. 788, 802 (1992). Because these elements are not just pleading requirements but an indispensable part of the case, each element must be supported, not merely alleged. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992).

The doctrine of mootness is the result of the requirement that the three element "irreducible minimum" must exist at any time a federal court acts, not merely when a complaint or petition is filed. Thus, mootness occurs when one or more elements of the test ceases to exist, depriving the court of jurisdiction. *See Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478 (1990) (noting that the "case or controversy" requirement continues through all stages of review and applying the three-element test to find a claim moot on appeal, although a "case or controversy" existed when the suit was filed). *See also DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974). Parties may still disagree about an underlying legal or factual issue. But without more, they cannot receive a federal court's attention merely because of that disagreement. Plaintiffs may fear future consequences. But "[a]llegations of possible future injury do not satisfy the requirements of Article III." *Whitmore v. Arkansas*, 495 U.S. 149, 159 (1990), *see also id.* at 156-161 (discussing this Court's precedents on what constitutes an injury in fact). If a litigant fails to set forth facts sufficient to meet the requirements of Article III, "[a] federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Id.* at 156-157.

This Court clarified the application of the mootness doctrine to habeas petitions challenging criminal convictions in three cases decided in the 1960's. First, in *Parker v. Ellis*, 362 U.S. 574 (1960) (per curiam), this Court held that a habeas petition challenging a criminal conviction became moot when the prisoner was no longer in custody because the

petitioner had received the only remedy the habeas corpus statute authorized: release from detention. Then in *Carafas v. LaVallee*, 391 U.S. 234 (1968), this Court recognized that the substantial issue in *Parker v. Ellis* was interpretation of the custody requirement of the habeas corpus act. *Id.* at 238. This Court held that the 1966 amendments to the habeas corpus statute permitted relief if the petition was filed while the petitioner was in custody, and that the civil disabilities the petitioner in *Carafas* suffered as a result of his conviction (a bar from engaging in certain businesses, a bar from serving as a union official for a certain time, a bar from voting in New York state elections, and bar a from serving on juries) were sufficient injuries to prevent the case from becoming moot after his release. *Id.* at 237-240. Finally, in *Sibron v. New York*, 392 U.S. 40, 58 (1968), the Court adopted the doctrine that because of the serious civil disabilities that accompany a criminal conviction, a habeas corpus challenge to a criminal conviction is not moot unless it is shown that no collateral legal consequences will be imposed based on the challenged conviction.

These cases are all consistent with the three element test for jurisdiction. Assuming, as the Court concluded in *Parker*, that the habeas corpus act in 1960 provided no remedy that could be granted unless accompanied by release from custody, then the third element of the test could not then be met after a petitioner was released from custody regardless of the collateral consequences accompanying a conviction. Since a remedy was not statutorily available, no further mootness analysis was requried. When the Court later concluded that relief could statutorily be granted without a petitioner's being in physical custody, further mootness analysis became necessary in *Carafas* and *Sibron* to determine if a "case or controversy" existed after release of a prisoner challenging his conviction.

The Court's holdings in *Sibron* and *Carafas* recognized a significant shift in the meaning of the custody requirement in the habeas statute, but they did not mark a departure from past jurisprudence on the "case or controversy clause." The *Sibron* doctrine is simply a recognition that criminal convictions are self-evidently injuries that create a "case or controversy" due to the serious *present* civil disabilities that necessarily result from criminal convictions. *See Carafas v. LaVallee*, 391 U.S. at 237-238. This Court in *Sibron* did not hold or suggest that a *future* hypothetical civil disability could create jurisdiction.

In *Lane v. Williams*, this Court clearly defined a critical limit on the *Sibron* holding. While Sibron had challenged his criminal conviction, Lane challenged only a sentence resulting in a parole term that was later revoked, not the conviction itself. Therefore, the Court was asked if the collateral consequences of a parole revocation, like the collateral consequences of a conviction, defeated mootness. In language that could hardly be more clear, this Court said the answer was no: "The doctrine of *Carafas* and *Sibron* is not applicable in this case." *Lane v. Williams*, 455 U.S. at 633.

The difference, the Court explained, was in the nature of the effects of a parole violation versus the effects of a conviction. "No civil disabilities such as those cited in *Carafas* result from a finding that an individual has violated parole." *Id.* at 633. This Court noted that tangible collateral consequences sufficient to prevent mootness are present disabilities such as bars from voting, holding public office, or serving on a jury, not future potential disabilities such as a negative affect on future parole chances. *Id.* at 633 n.13. None of the present disabilities identified in *Carafas*, nor anything comparable to them, results from a parole revocation.

This Court specifically addressed in *Lane* the particular injury alleged below by Spencer, a revocation's effect on future parole consideration. The Court pointed out that unlike the injuries considered in *Sibron*, the impact of a parole revocation on future parole consideration was speculative. A parole revocation was only one factor that would be considered at a future parole hearing. Moreover, for the petitioner to be again considered for parole would require an intervening illegal act. *Id.* This Court also addressed the possible impact on discretionary decisions that might be made by a future employer or sentencing judge. Those decisions would be more affected by the conduct underlying a parole revocation than by the fact of revocation. *Id.* at 632-633.

Each of these injuries was hypothetical and conjectural as opposed to actual or imminent, and thus did not constitute an injury in fact. *See Northeastern Florida Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, Florida*, 508 U.S. 656, 663-664 (1993). None met the constitutional test. None presented a real as opposed to a speculative likelihood that a favorable decision on the habeas petition would remedy the alleged injury. *See Id.*

The Court in *Lane v. Williams* thus upheld the "case or controversy requirement" against an attempt to expand it to include hypothetical future injuries. The Court recognized a distinction between the present and actual disabilities that result from legislation limiting the rights of those convicted of crimes and the less tangible possibility that a parole revocation may have future adverse consequences. The "case or controversy" requirement dictates that the class of cases in which jurisdiction is presumed to exist be limited to cases, like habeas petitions challenging criminal convictions, in which there is no question that the three element

jurisdictional test has been met. Spencer's argument here is an attack on the logical and constitutionally-based approach this Court established in *Lane v. Williams* for applying a mootness analysis.

This Court's approach in *Lane v. Williams* is neither badly reasoned nor unworkable and should be followed. *See United States v. International Bus. Machines Corp.*, 116 S.Ct. 1793, 1791 (1996). It is a reasonable and perhaps inevitable application of general principles concerning what creates a case or controversy to the specific case of the collateral consequences of a parole revocation. To depart from it would be an unjustified abandonment of the doctrine of *stare decisis*, which as a general rule directs this Court to adhere to the explication of rules of law in past cases as well to their holdings. *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996). This Court's decision and reasoning in *Lane v. Williams* should be followed. The *Sibron* doctrine should not be expanded from the tangible collateral consequences of criminal convictions to the ephemeral speculative consequences Spencer attributes to parole revocations.

B. Spencer's burden of showing that he will suffer from a present civil disability should not be reduced, either by permitting Spencer to merely hypothesize possible future uses of his revocation record, or by shifting to the State the burden of imagining and then disproving all conceivable future impacts.

The critically important question of allocating burdens of proof is affected by the key distinction between the *Sibron* rule applicable to criminal convictions and the general rule applied to parole revocations in *Lane v. Williams*, *i.e.*, from the fact that the existence of concrete present civil disabilities is self-evident in the case of a criminal conviction, but not in the case of a parole revocation. Rather than impose on the

petitioner a burden of proving the existence of a harm that can be remedied, the *Sibron* rule presumes jurisdiction because of the well-known present civil disabilities that necessarily accompany a conviction. Thus, petitioners challenging criminal convictions can avoid a mootness finding by merely pointing to statutory and similarly inexorable impacts. But the Court in *Lane v. Williams* was unwilling to presume that the consequences of a parole revocation would meet this test because the present civil disabilities that necessarily accompany a criminal conviction do not accompany a parole revocation. The Court in *Lane v. Williams* thus left the petitioner with the burden of showing that he suffered from an injury in fact, caused by the challenged conduct and likely to be remedied by a favorable decision. This burden is consistent with and required by this Court's jurisprudence discussing the "case or controversy" clause.

Spencer is asking this Court to announce a presumption that a parole revocation itself, not the original conviction nor conduct underlying the revocation, causes sufficient harm even after a petitioner's release on renewed parole to permit continued jurisdiction. This would be a momentous step not supported by law or reason. The present civil disabilities that result from a criminal conviction, such as restrictions on voting, jury duty, holding office and engaging in certain businesses, do not result from a parole revocation. Similarly, the fact of a criminal conviction may lead to enhancement of a future criminal sentence or future testimonial impeachment. *See Evitts v. Lucey*, 469 U.S. 387, 392 (1985) But the fact of a parole revocation does not have similar consequences. In fact, the principal ills newly alleged by Spencer and discussed in detail below result from the conduct that caused his parole to be revoked. Yet Spencer would have this Court presume causation, and force the state to conceive of and then disprove any potential consequences

of a revocation.

Of course, proving the negative, as *Sibron* would require if a state claimed that a petition challenging a conviction had become moot, is always problematic. If the hypothetical ills Spencer lists are sufficient (*e.g.*, a revocation might be used to impeach future testimony), it may be impossible to prevent every revoked parolee from seeking relief step-by-step through the federal courts, despite having been reparoled or otherwise released from custody long before. It is impossible to quantify the number of petitions now dismissed as moot or never filed that would clog the federal courts, were the *Sibron* doctrine expanded beyond criminal convictions. There are many groups that would qualify to pursue habeas relief, as inmates who receive conduct violations, or are denied parole for bad conduct, or denied time off for good behavior might all be handed a basis for demanding federal relief. For example, a future character witness could be asked about his knowledge of any of these events and its effect on his opinion, just as he could be asked about a parole revocation. Opening the courthouse doors to such cases would have the practical effect of delaying petitions by inmates challenging convictions or actual confinement. Nothing in the law or the facts of this case justifies such a change.

C. Spencer has been unable to prove that his 1992 parole revocation would affect his future eligibility for parole. He should not now be allowed to allege new injuries.

Spencer's allegation that his parole revocation will negatively affect future parole consideration is the only alleged injury that is properly before this Court. Spencer's other four allegations of injury were not briefed or considered

in the court below. The court below found that the single alleged injury is insufficient to create jurisdiction, for the effect of a parole revocation on future parole consideration in Missouri is even more speculative than the effect in Illinois which this Court found inadequate to create jurisdiction in *Lane v. Williams*. The court below used the analysis found in *Lane v. Williams*, noting the discretion permitted by Missouri law, and emphasizing that the law applies to Spencer only because he committed another crime. Spencer thus is the intervening cause of any effects that will occur (J.A. 135-137). The court's analysis of Missouri law is correct. That law gives the parole board "almost unlimited discretion in whether to grant parole release." *State ex rel. Cavallaro v. Groose*, 908 S.W.2d 133, 135 (Mo. 1995) (en banc) (citing *Ingrassia v. Purkett*, 985 F.2d 987, 988 (8th Cir. 1993)); MO. REV. STAT. §217.690 (1994). Missouri parole regulations set forth in MO. CODE REGS. tit. 14, § 80-2.010 "do not limit the broad scope of discretion given the Board by 217.690." *Shaw v. Mo. Bd. of Probation and Parole*, 937 S.W.2d 771, 772 (Mo.Ct.App. 1997). But those regulations show how speculative Spencer's claim of harm is.

Whether an inmate has ever had a probation or parole revoked is one of nine "conviction and confinement" measures that are first considered in determining parole eligibility. These nine factors are combined with the seriousness of the offense and the length of sentence in arriving at a guideline range in which parole is normally granted. *See* State of Missouri Department of Corrections Board of Probation, RULES AND REGULATIONS GOVERNING THE GRANTING OF PAROLES, CONDITIONAL RELEASES AND RELATED PROCEDURES, MBPP-259, at 18-23 (1992).[6] The fact of a parole revocation is not itself something that the parole board is required to consider in granting parole; it is

[6] Twelve copies of this booklet will be lodged with the Court.

only a factor in setting a guideline range within which the board normally grants parole, absent other considerations. And under the Missouri regulations, the only question is whether Spencer ever had any parole revoked (*id.* at 23), not how many times or for what violations.

Spencer has not alleged or established that the challenged revocation would affect even a single factor considered in arriving at guideline range for parole.[7] Yet it was Spencer's responsibility at each step of the proceeding to prove an injury fairly traceable to the challenged conduct and likely to be redressed by the requested relief. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 478 (1990); *Lujan v. Defenders of World Wildlife*, 504 U.S. 555, 562 (1992); *Franklin v. Massachusetts*, 505 U.S. 788, 802 (1992); *Allen v. Wright*, 468 U.S. 737, 751-753 (1984). Spencer did not allege injuries from the possibility of future sentence enhancement and from the possibility of future impeachment until his reply to the brief in opposition to the petition for certiorari. He did not allege the injury of the use of the parole revocation under FED.R.EVID. 413 or the injury or preclusion from filing suit under 42 U.S.C. §1983 until his main brief to this Court. In his main brief, however, Spencer now questions whether these injuries defeat mootness (Spencer Br. i). The possible effect on future parole eligibility was the only specific injury alleged in the certiorari petition. It was the only injury alleged in Spencer's second question presented as it was drafted in the certiorari petition (Cert. Pet.).

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[7] Interestingly, Spencer never alleges that this was his first or only revocation. Thus he has failed to show that removal of the revocation at issue in his habeas petition would have any impact at all on a future parole, even through the roundabout way of being a single factor affecting a recommended time range for parole.

Spencer not only now adds new "injuries," he attempts to distinguish his case from *Lane v. Williams* by disavowing the very "injury" that was the basis for his claims in the court of appeals and the certiorari petition. Spencer now declares that he does not rely on the effect the Board of Probation and Parole's finding would have on any future parole consideration, though he then points to this consequence as one among several (Spencer Br. 40). Spencer acknowledges that this Court in *Lane v. Williams* rejected the effect of a parole revocation on future parole consideration as an allegation of injury sufficient to create jurisdiction.

Spencer cannot now so distance himself from that allegation of injury, and allege new injuries not alleged in his brief to the court below nor addressed by that court. It was his burden to prove jurisdiction in the court below. And this Court's precedents prevent him from presenting here a basis for relief not presented to the court below. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362-363 (1981); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).[8] Spencer should be limited to establishing jurisdiction based on the injury he alleged in the court below and in his certiorari petition, *i.e.*, future effect of a parole revocation on a future parole hearing. And since he has failed to prove such an effect, his claim would fail even if this Court in *Lane* had not already rejected that effect as a basis for the continued federal court jurisdiction.

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[8] One exception allows a petitioner in a case that became moot on appeal to allege a new injury if mootness is attributable to a change in the legal framework governing the case that occurred during litigation and the new framework supports a claim of injury that was understandably not previously raised. In such a case a remand is appropriate for consideration of the impact of the newly alleged injury. *Lewis Continental Bank Corp.*, 494 U.S. 472, 478 (1990). This exception has nothing to do with Spencer, who has simply expanded the list of alleged injuries at the 11th hour to improve his argument.

D. Spencer's new claims are largely illusory, and even his speculative injuries are largely based on Spencer's underlying conduct, not the fact of a parole revocation.

Like his claim that his future parole eligibility might be affected, Spencer's newly identified injuries do not meet the three-part test set out in *United Food and Commercial Workers v. Brown Group*, 116 S.Ct. at 1533, and should be rejected under the reasoning this Court used in *Lane v. Williams*, 455 U.S. at 633-635.

i. **Sentence Enhancement**

Spencer alleges that under Missouri law, if he committed a future sexual offense and were convicted, he would be found to be a predatory sexual offender under MO. REV. STAT. § 558.018, (Supp. 1996). Predatory sexual offenders are subjected to an enhanced sentence, and are not subject to being discharged from parole following the conviction and completion of the new sentence (Spencer Br. 30-33). Spencer is right; he would be subject to § 558.018. But not because of his parole revocation. Spencer had already been convicted of sodomy at the time of his parole violation, and so already fit within this statute. *See* (J.A. 75). And even without such a conviction, his argument that this alleged collateral consequence defeats mootness would be meritless.

To fall within the enhanced sentencing provisions of this statute Spencer would have to be convicted of a specified sexual offense and the court sentencing him on the new conviction would have to find that Spencer had previously committed a specified sexual offense. *See*, MO. REV. STAT.§ 558.018 (Supp. 1996). It is speculative to assume Spencer would again commit a new sexual offense. It is

even more speculative to suggest that a court would blindly rely on the fact of a parole revocation when sentencing. The evidence of a sexual offense that was one factor in the revocation, not the revocation itself, would be relevant at a future sentencing. And victory in this case would not affect that evidence.

Moving from a future sexual offense to a claim that he might be convicted of a capital offense, Spencer next alleges that the 1992 parole revocation may be used to prove the statutory aggravating circumstance of a serious history of assaultive criminal convictions. But Spencer's claim that "[i]n Missouri the prosecution can adduce evidence of a parole violation to prove 'a serious history of serious assaultive criminal convictions' in the penalty phase of capital trial" (Spencer Br. 32) is not a correct statement of Missouri law. It certainly is not supported by the decision Spencer cites, *State v Nave*, 694 S.W.2d 729, 738 (Mo. 1985) (en banc), *cert. denied*, 475 U.S. 1098 (1986). In *Nave*, a prosecutor detailing a string of prior felonies in order to prove a history of convictions mentioned that while the defendant was on parole from two life sentences for rape and robbery, he was convicted of burglary and his parole was revoked. *Id.* at 738. This case does not stand for the proposition that parole revocations in Missouri can be used to show a prior history of serious assaultive convictions. Indeed, this proposition does not make sense, since a parole revocation is neither a conviction nor evidence of a conviction. A holding that a prosecutor's mention of a parole revocation while telling the jury of the conviction that caused it is not reversible error does not support the proposition that a parole revocation is proof of a statutory aggravating circumstance in a Missouri capital case. And it certainly does not make the possibility that the 1992 revocation would affect Spencer's chances of a death sentence anything more than wild speculation.

Leaving behind the specific contexts of sentencing in a sexual offense or capital case, Spencer next alleges that his parole revocation subjects him to enhanced sentencing under more generally applicable Missouri sentencing guidelines. Those guidelines are purely advisory, *see* MO. REV. STAT. § 558.019.6 (1994). But Spencer's assertion would be incorrect even if they were mandatory. Spencer alleges that a sentencing judge using the guidelines would have to find that his parole revocation terminated "a substantial period of crime-free living" and therefore that he was not entitled to mitigating consideration for that time (Spencer Br. 32, (citing MISSOURI SENTENCING ADVISORY COMMISSION GUIDELINES USER MANUAL 1997; henceforth GUIDELINES, at 18)). The passage on which Spencer relies, however, on its face specifically defines "a substantial period of crime free living" not to include "time served under [a criminal] sentence." GUIDELINES at 18. Spencer's assertion that he would be affected by this provision is illogical. Prior to his revocation, Spencer was serving time under a criminal sentence under the supervision of the parole board. Prior to that he was serving time in the Missouri Department of Corrections. Spencer's time spent in prison and on parole as part of a sentence for a criminal conviction would not count as a substantial period of crime free living under the Missouri guidelines, regardless of how Spencer behaved.

Further, nothing in the Missouri guidelines directs a sentencing judge to look at the fact of a revocation. Under the guidelines, the conduct that caused the revocation may be a relevant consideration in passing sentence. The revocation itself is not. In arguing otherwise Spencer ignores the fact that the Missouri sentencing guidelines treat criminal convictions much differently than parole revocations. Parole revocations are not even referred to in the guidelines, while criminal convictions are specifically identified as a

consideration in determining the criminal history of the defendant for sentencing purposes. *See* GUIDELINES at 7.

Apparently Spencer is not only convinced that he will commit a sexual, capital, or other Missouri crime, but that he might also commit a federal crime. Thus he argues that three specific portions of the United States Sentencing Guidelines would take into account that he had previously had a parole revocation: U.S. SENTENCING GUIDELINES MANUAL §§ 4A1.1(d), 1B1.4 and 4A1.3 (1994) (Spencer Br. 32-33). But he misreads all three.

The first section, § 4A1.1(d), provides that points are added to a criminal history computation if a defendant committed his current offense while under sentence for another crime. The fact that Spencer had his parole revoked in 1992 in no way qualifies him to have points added to his criminal history for sentencing purposes under this section. Spencer's sentence expired in October 1993. Spencer's 1992 parole revocation did not change that date. Even if Spencer were claiming that he committed some federal crime between his 1992 revocation and the end of his sentence in 1993, § 4A1.1(d) could not logically be read to subject Spencer to the threat of a future enhanced sentence based on the 1992 parole revocation.[9]

The second referenced portion of the guidelines, § 1B1.4, provides that a sentencing court may consider without limitation information about the background,

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[9] The only way Respondent can imagine this provision having anything to do with a parole revocation would be if a parolee was revoked and absconded, thus tolling the running of his sentence, and if the theoretical parolee then committed a federal crime while in absconder status, after his sentence otherwise would have expired. This hypothetical has nothing to do with the facts of Spencer's case.

character, and conduct of a defendant, unless otherwise prohibited from doing so by law, in determining whether to impose a sentence within the guideline range. This provision simply says that a sentencing court has the discretion to look at a defendant's background. This is exactly the type of discretionary consideration this Court held does not overcome mootness in *Lane v. Williams*, 455 U.S. at 633 n.13.

Finally, § 4.A1.3 provides that a sentencing court may consider imposing a sentence outside the guideline range if the criminal history determined from the guidelines does not adequately reflect the seriousness of the defendant's past criminal conduct. Prior *similar* conduct established by a civil adjudication or failure to comply with an administrative order may be considered for purposes of this provision. Thus, a sentencing court may in its discretion look at Spencer's 1992 parole revocation if he is ever convicted of a crime similar to those for which his parole was revoked. Regardless of whether it could consider the revocation, the court could, of course, look at information underlying the violation. But most important, this provision does not require a sentencing court to do anything; it merely permits it to keep part of the discretion it had prior to the adoption of the guidelines. Again, this exactly is the type of discretionary review that does not overcome mootness. *Lane v. Williams*, 455 U.S. at 633 n.13.

The provisions of the sentencing guidelines cited by Spencer do not establish that parole revocations must be considered in determining a defendant's criminal history. Sentencing guidelines require criminal convictions to be considered in sentencing. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.1 (1994); U.S. SENTENCING GUIDELINES MANUAL §5A (1994) (sentencing table). Parole revocations are not criminal convictions. Though Spencer tries to tie

them together, the effects of a parole revocation and a criminal conviction on a future federal sentence are not similar. The former is merely one more piece of background data that a court may in its discretion consider for what it is worth. The latter has an inescapable effect on the sentencing calculus. It is fallacious to argue that since the sentencing enhancement consequences of a criminal conviction defeat mootness the consequences of a parole revocation must also do so.

ii. **Impeachment**

Taking a step beyond his claims that he might some day be denied parole or subjected to an enhanced sentence, Spencer next turns to the possibility that the revocation might harm his case at some future trial. Spencer first alleges that in Missouri his credibility may be impeached by a parole revocation should he testify at a future trial. This claim is simply wrong.

In support of his allegation, Spencer cites *State v. Comstock*, 647 S.W.2d 163, 164-166 (Mo.Ct.App. 1983), for the proposition that in Missouri a parole or probation violation may be used to impeach a witness--including a defendant in a criminal trial (Spencer Br. 33-34). *Comstock* does not support this proposition. In *Comstock*, a defendant charged with sodomizing another inmate while in prison testified that he would not have committed the crime for which he was on trial because "I had my parole and everything in line." *Comstock*, 647 S.W.2d at 164. On cross-examination the defendant explained why he was in prison: he had been convicted of stealing, placed on probation and the probation had been revoked for sodomy. *Id.* at 164. The prosecutor then questioned whether his testimony, that he would not do anything to jeopardize his parole, was consistent with his probation revocation. *Id.* at

164-165. The trial court overruled objections to this line of questioning, noting that the defendant had already testified about the probation prior to the objection. *Id.* at 164-165. The Missouri Court of Appeals affirmed the trial court, noting that the theory of error raised on appeal was different than that raised at trial; that the defendant opened up inquiry about his probation revocation through an unsolicited response, to which the prosecutor properly reacted; and that the comment was not so manifestly prejudicial as to constitute plain error. *Id.* at 165-166; *see* MISSOURI SUPREME COURT RULE 29.12(b) (noting that unpreserved claims of error may be reviewed when a court finds that a manifest injustice or miscarriage of justice has resulted).

The rule in Missouri is contrary to the one Spencer tries to find in *Comstock*. A witness, including a defendant, may be impeached based on a prior criminal conviction. But it is reversible error to go beyond this and bring out that the witness has breached parole. *See State v. Newman*, 568 S.W.2d 276, 278-282 (Mo.Ct.App. 1983). Thus, Spencer is not subject to general impeachment based on a parole revocation in Missouri. The revocation may be used to impeach Spencer only if he voluntarily brings it up or if the trial court commits reversible error, possibilities far too remote to create jurisdiction.

Second, Spencer alleges that his parole revocation for armed criminal action and forcible rape would be admissible to prove character or a trait of character where character or a trait of character is an essential element of a charge, claim, or defense under FED.R.EVID. 405(b) and similar Missouri case law. It is difficult to think of an hypothetical example in which aspects of Spencer's character that are shown by his revocation would be an essential element of a charge, claim or defense. More likely (and what Spencer really argues), the evidence that underlies the revocation would be presented to

establish character or the character trait. Because even if the parole revocation is removed the conduct underlying it remains the same, this alleged injury is not an injury in fact and it is not likely to be cured by a favorable decision. The admissibility of the rape and drug use under Fed.R.Evid. 405(b) to prove character or a character trait would be unaffected.

Finally, Spencer alleges that if at some future time he wishes to call witnesses to testify to his good character, his witnesses could be asked whether they knew about the parole revocation. As authority he cites Fed. R. Evid. 405(a) and the Missouri precedent of *State v. Sweet*, 796 S.W.2d 607, 614 (Mo. 1990) (en banc), *cert. denied*, 499 U.S. 1019 (1991). *Sweet* involved a character witness questioned about his knowledge of a defendant's prior *arrests* and their effect on his opinion of the defendant. *Sweet*, at 614. If witnesses who give opinions about a defendant's character may be asked about their knowledge of a prior arrest, they logically may also be asked about their knowledge of a parole revocation. But this type of questioning is not impeachment in the sense that a criminal defendant may be impeached by the fact of a prior conviction. Rather, it is an inquiry into the basis supporting opinion testimony.

The possibility that character witnesses will be asked if their opinions of a defendant's good character take into account a parole violation has little in common with the civil disability created by liability to personal impeachment through the fact of a criminal conviction. Impeachment by criminal conviction has a drastic impact on a defendant's right to testify in his own defense--a core liberty essential to our system of ordered liberty. The removal of a conviction removes its effect on a defendant's right to testify. But parole revocations have no impact on this core liberty. Further, removal of a parole revocation does not remove the

ability to challenge character evidence. Character witnesses may just as easily be asked if they are aware of a defendant's arrest for a crime and the recommendation that his parole be revoked for that crime. Additionally, a defendant who puts his character into question opens the door to evidence of the bad acts that led to the revocation, and this underlying evidence will still exist even if the revocation is removed. That Spencer would be a defendant, put his character in question, and be faced with testimony by someone who would be asked about the 1992 revocation rather than about the events that prompted it is a possibility too speculative and remote to justify further action in this case.

Spencer's decision to call the Court's attention to these evidentiary issues actually emphasizes the difference between the civil disabilities that result from a criminal conviction and the hypothetical and contingent effects identified by Spencer. Impeachment by criminal conviction is one among many collateral consequences that may keep a challenge to a criminal conviction viable after completion of a sentence. A criminal conviction is itself generally admissible for impeachment purposes. A parole revocation is not itself admissible for impeachment purposes, though in certain instances the conduct underlying a revocation may be used in a civil or criminal trial for a specific purpose. Alleged harm from the use of a parole revocation in a future judicial proceeding is so speculative as not to be an injury in fact. Because the alleged harm is unlikely to be remedied by a decision invalidating the revocation on procedural grounds, it is inadequate to establish jurisdiction after release from confinement.

iii. **FED.R.EVID. 413**

Taking a different approach to evidentiary effects, Spencer next alleges that under FED.R.EVID. 413 his parole

revocation may be used as substantive evidence should he be charged with sexual assault in a federal case. It is speculative to assume that Spencer will some day under some federal law be charged with sexual assault. Assuming, however, this were to occur, there would still be no injury in fact and no likelihood of remedy from a favorable decision overturning the parole revocation. It is the facts underlying the revocation, not the revocation itself that would be admissible and only then if their probative value outweighed their prejudicial effect. *See United States v. Guardia*, 955 F.Supp. 115, 117 (D.N.M. 1997) (noting that it is the consensus among judges, lawyers and legal scholars that FED.R.EVID. 403, which requires the probative value of evidence to outweigh its prejudicial effect, applies to evidence otherwise admissible under Rule 413). It is highly unlikely that a federal trial court would find the *fact* of a revocation to outweigh its prejudicial effect and admit it into evidence. The court would instead require proof of the underlying conduct. The revocation itself causes no injury in this context.

E. Spencer's claim that he cannot invoke 42 U.S.C. § 1983 would not have given the federal courts continuing jurisdiction even if he had made it below.

Next, Spencer alleges that the injury of preclusion from challenging his parole revocation in a suit under 42 U.S.C. § 1983 creates a case or controversy. There is no causal relationship here between the revocation process being challenged and the unavailability of a suit under § 1983. The only challenged conduct is alleged due process violations during Spencer's parole revocation proceedings. This conduct did not prevent Spencer from filing a §1983 suit. If Spencer is not able to file a § 1983 suit, it is the result of statutes and decisional law that limit the availability of § 1983 actions, not the fact that his parole was revoked. Thus Spencer

cannot demonstrate that a causal relationship exists between the alleged injury and the challenged conduct. *United Food and Commercial Workers v. Brown Group*, 116 S.Ct. at 1533. The conduct Spencer challenges in his habeas action is an element of a hypothetical damage suit under § 1983, not the reason the damage suit cannot be filed. Therefore preclusion from filing a § 1983, suit is not a collateral consequence of the parole revocation.

F. The Court should refuse to adopt Spencer's constitutionally unacceptable and impractical rule that mootness not be a consideration in handling habeas petitions.

Spencer claims that mootness is defeated by the hypothetical ills that he alleges may affect him in the future based on his 1992 parole revocation. These alleged injuries have little in common with the actual present civil disabilities that inevitably result from Spencer's criminal convictions. Spencer is essentially arguing that he can imagine circumstances in which a parole revocation could adversely impact his life. But that is not enough. As this Court noted in *Preiser v. Newkirk*, 422 U.S. 395, 403 (1975), mootness exists unless a party can demonstrate perceptible harm and is not cured by pleadings that are "an ingenious exercise in the conceivable" in which a party demonstrates that he "can imagine circumstances in which he could be affected by the agency's action."

The kind of speculative harm from which Spencer would create jurisdiction would just as easily be caused by a prison conduct violation, a disciplinary transfer between institutions, a parole denial for bad conduct, or even an arrest. It would also be caused by the fact pattern in *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055 (1997), in which the case of a social worker challenging a requirement that she

perform her job in English was mooted when the social worker left her job. The petitioner in that case would certainly make an argument that if she at some point sought renewed government employment as a social worker, she would be hampered in the performance of her duty by the challenged law. Under Spencer's reasoning, that would be a winning argument.

Spencer's argument necessarily implies that either this Court's jurisprudence on mootness and the "case or controversy" requirement should be drastically modified, or that it simply should not be applied in cases involving parole revocations. He tries to phrase his request as one for an "exception" from the mootness rule. But mootness, derived as it is from constitutional limits on federal court jurisdiction, has never been susceptible to "exceptions." Spencer really wants to say that every judge who considers a mootness claim has to make some kind of undefined, equitable determination, after factfinding and based on such factors as how many days the state requested in which to respond--and why. The practical problems of such a change, in terms of managing judicial workloads, would be great but the damage to well established constitutional principle would be greater. There is no good nor constitutionally permissible reason to depart from well-reasoned precedents to take the difficult path to which Spencer directs us.

II. Spencer's situation cannot justify a disruptive and unfair rule giving preference to habeas petitions brought by those who are closest to release in the absence of judicial action.

A. Spencer's complaint about the inability of the district court to resolve his petition in the few months he was still in custody is not based on any constitutional violation.

As discussed above, Spencer seeks to justify a new rule in which mootness disappears as a basis for dismissing habeas petitions challenging parole revocations. But a portion of his argument, the part that pertains to the first question on which certiorari was granted, presents an alternative approach: if you maintain the general concept that habeas petitions challenging parole revocations become moot once a petitioner's sentence ends, then you should require federal courts to complete litigation of the case before that point is reached, or excuse mootness if the courts fail to perform this new duty. Such a rule would be unjustified, unprecedented, impractical, and unfair.

Spencer's proposed alternative rule is certainly not required by the Constitution. There is no right to have a habeas corpus petition decided in a specific amount of time. *See United States v. Samples*, 897 F.2d 193, 195 (5th Cir. 1990). Nonetheless, Spencer's case was heard and decided in just months by three state courts. His case was fully briefed before the district court hardly more than three months after his filing was complete. He was reparoled a few days later. His situation presents no justification for a rule requiring continued litigation of an otherwise moot claim.

There is no dispute that Spencer had access to the state courts of Missouri to litigate his claim. Spencer acknowledges that he litigated and exhausted his claim unsuccessfully in the circuit court of his county of confinement, the Missouri Court of Appeals, and the Missouri Supreme Court (J.A. 4-5). The judges of these courts are sworn to uphold the United States Constitution, and they did so. But that is not enough for Spencer. Though he was not denied access to court, he claims that he had a right to a decision in a federal forum. He insists that he was entitled to a final federal court decision on the merits before his claim became moot. Though he asserts that this right was of a

sufficient constitutional dimension to overcome the "case or controversy" requirement and require adjudication of a claim that would otherwise be moot, he is unable to cite a decision of this Court supporting his novel position.

Spencer's references to the habeas corpus act, 28 U.S.C. § 2254, and to 42 U.S.C. § 1983, are unavailing. Those are statutory remedies. They are not themselves constitutional provisions that exist independently of the requirement for a "case or controversy". This Court long ago recognized that there is no free standing federal constitutional right to a federal forum to collaterally challenge confinement by a state. *See Ex parte Dorr*, 3 How. 103, 104-105 (1845) (no jurisdiction to grant habeas relief to state prisoner absent statutory authorization even though prisoner had no practical way to otherwise access a federal forum). Modern decisions of this Court continue to implicitly acknowledge that principle. *See Heck v. Humphrey*, 512 U.S. 477, 489 n. 10 (1994); *see also Maleng v. Cook*, 490 U.S. 488, 493 (1989) (noting that collateral consequences of a criminal conviction do not independently justify habeas corpus review in a case in which a petition was not filed while the petitioner was in custody). If a constitutional right to federal review of habeas corpus claims existed, this Court's reasoning in *Maleng v. Cook* and the reasoning in cases on which *Maleng* was based would be unnecessary and nonsensical. *See Carafas v. LaVallee*, 391 U.S. 234, 237-239 (1968) (noting that jurisdiction to consider challenges to criminal convictions on which the sentences had been completed during habeas litigation flowed from the 1966 amendments to the habeas corpus act). There is no statutory authority for a rule requiring challenge to parole revocations to be decided before

a petitioner is released[10] and no constitutional doctrine that would permit a case to continue if it was not decided before it became moot upon a petitioner's release. Therefore, Spencer's new rule would be contrary to statutory law and, insofar as it sought to excuse mootness, unconstitutional.

B. Spencer's petitions were handled in a reasonable fashion by both three state courts and one federal court before his claim became moot.

Spencer acknowledges that his case moved through the Missouri courts from a trial court level to adjudication on the merits in the Missouri Supreme Court in the few months between his September 24, 1992, parole revocation and March 23, 1993 (J.A. 7-10). Spencer does not complain that Respondent or the Missouri courts delayed his case in the state courts and in fact in the district court he appeared to complain that the Missouri courts moved too swiftly (J.A. 104-105).

Spencer's brief on the merits repeatedly implies that Respondent acted negligently or in bad faith with the purpose of delaying a decision on the merits of Spencer's habeas corpus petition while the case was in the district court and that the district court breached a duty to decide the case in a timely manner (Spencer Br. 7-11, 18-23, 49-50). Nothing in the record supports either improper inference, and both should be disregarded. In fact, it was unreasonable for Spencer to expect the respondent and the district court to set aside equally important cases to give his case preferential treatment to insure it would be fully litigated before his pending release on parole and completion of his sentence.

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[10] Congress certainly knows how to indicate that a class of cases should receive expedited habeas corpus processing. *See* 28 U.S.C. § 2261-2266 (expedited processing of capital cases).

The record indicates that counsel for Respondent sought two extensions, both of which were based on the press of other cases (including habeas corpus cases), and that neither extension was designed to delay the case (J.A. 19-21, 26-27). The district court granted the extensions based on a showing of good cause (J.A. 21, 22-25, 30-36). Not only does nothing in the record refute the assertions in the extension motions and the findings of the district court as to why the extensions were sought and granted, the extensions had no real effect on the case becoming moot. Thus, it is illogical to argue that the extensions should provide a reason for excusing mootness.

Spencer filed the petition on April 1, 1993--approximately four months before the case was mooted by Spencer's re-parole on August 7, 1993 (J.A. 1, 30).[11] In order to avoid mootness, the district court and the court of appeals would both have had to complete work on the case by the time petitioner was reparoled. *See Watts v. Petrovsky*, 757 F.2d 964 (8th Cir. 1985) (dismissing a challenge to parole revocation as moot when the petitioner was reparoled after briefing of his case but prior to oral argument). There is no reason to believe that the case could have been jammed through the courts that quickly even if Respondent had responded to the show cause order on the very day it was received. *See* FED.R.APP.P. 31(a); *see also* EIGHTH CIRCUIT INTERNAL OPERATING PROCEDURES, APPENDIX A CHRONOLOGY OF EVENTS FOR A TYPICAL CIVIL APPEAL IN THE EIGHTH CIRCUIT (Revised October 1, 1991).

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[11] The case was not ready to be processed until the filing fee was received on April 15, 1993, a two week delay that cannot be logically blamed on Respondent or the district court. *See Weaver v. Pung*, 925 F.2d 1097, 1098-1098 (8th Cir. 1991) (noting that petition is not considered filed for purposes of creating subject matter jurisdiction until in forma pauperis status is granted or the proper filing fee is paid).

The district court asserted that the case would not be delayed beyond the demands of its docket (J.A. 127). There is nothing in the record that refutes the assertion of the district court. Both the respondent and the court did what they could and should have done during the brief period between the day the petition was filed and the day the case became moot. They did not resolve the merits of Spencer's claim in a federal court. But he had the chance to fully litigate his claims through three levels of state courts.

It would be impractical to require district courts and courts of appeals to expedite all habeas petitions in danger of becoming moot so that the petitions could be fully litigated through the federal appellate courts before mootness occurred. Completion of appellate, not just trial court action would be necessary to defeat mootness, since if mootness occurred at any stage of the proceedings the case would have to be dismissed. A petition filed, as was Spencer's, four months before a scheduled release on parole cannot be fully litigated in federal court in any time frame resembling the normal period for processing petitions before it becomes moot. Yet Spencer implies that a petition filed one week or one day before the petitioner's release must be fully litigated before mootness occurs. Neither Spencer's actual scenario (final decision required within four months) nor his proposed rule (all petitions finally decided before the petitioner's sentence ends, no matter how little time remains, how difficult the issues, or how burdened the court), is practical.

C. To require that the federal district courts and courts of appeals give priority to habeas petitions filed by those who will shortly be released without court action would be impractical and unfair.

Spencer explicitly argues his case should have been

singled out by Respondent and the district court for expedited review, and decided ahead of challenges to criminal convictions. He explains that because challenges to criminal convictions in habeas corpus actions generally involve long sentences, exhaustion requirements pose no obstacle to eventual review (Spencer Br. 19). Spencer argues parole revocation cases are special because the possibility of release upon reparole prior to exhaustion creates a great possibility that no federal forum will ever be available to review the revocation. *Id.* To the contrary, logic, fairness and habeas law dictate other priorities.

In demanding priority Spencer implicitly asks the Court to compare two prisoners: one who is serving a very long sentence with a petition that can easily be litigated long before expiration of the sentence, and one who is about to be released. According to Spencer, the court should delay acting on the petition filed by the first (thus leaving the prisoner incarcerated) and take up the petition filed by the second. Otherwise, Spencer cries, he is being denied an entitlement to federal habeas corpus review that is available to all those challenging criminal convictions in federal habeas corpus actions. (*See* Spencer Br. 19). That turns habeas jurisprudence on its head. How can a writ that was intended to release those unjustly imprisoned be the basis for a rule that gives those facing long periods of imprisonment a lower priority than those about to go free?

Spencer never explains how his proposed rule would co-exist with the requirement that a petitioner not challenge his confinement by a state authority in a federal habeas corpus action unless he has exhausted all remedies available in the state courts and he is still in custody. 28 U.S.C. § 2254(a), (b). Since exhaustion of state remedies can often take years, generally convictions resulting in short sentences cannot be reviewed in federal habeas corpus actions.

Therefore it is not surprising that most federal habeas corpus suits involve challenges to relatively long sentences. This does not demonstrate that petitioners challenging parole revocations are denied any entitlement to federal review provided to those challenging criminal convictions.

There is no sound policy reason for giving parole revocation cases special expedited treatment. Moreover, to require district courts to give such cases expedited treatment and excuse their mootness would undermine the exhaustion requirement of 28 U.S.C. § 2254(b) and the custody requirement of 28 U.S.C. § 2254(a). *See Maleng v. Cook*, 490 U.S. 488, 493 (1989) (noting that allowing review of petitions filed after the expiration of sentence would read the in-custody requirement out of the habeas corpus statute and be contrary to the clear implication of earlier precedent). If Spencer's case was guaranteed a decision prior to mootness, and if failure to decide the case excuses mootness, then all cases involving relatively short sentences that now cannot receive federal habeas review because of release prior to exhaustion of state remedies would also logically receive federal habeas review. This is because an inherent right to review of sufficient constitutional dimension to overcome the "case or controversy" requirement would necessarily overcome the statutory exhaustion and in-custody requirements set out in 28 U.S.C. § 2254. Were that so, there is no logical reason why former prisoners who had been released from state custody prior to exhausting state remedies could not assert their newly created constitutional right to a federal forum, to press their complaints. There is no jurisprudential support for going down this path.

Congress could have drafted a habeas corpus statute so broad that short terms of confinement or fines were reviewable through habeas corpus in the federal courts. It did pass the Antiterrorism and Effective Death Penalty Act of 1996.

Spencer claims that act somehow supports the premise that his case is not moot. (Spencer Br. 48-49). This act was not an attempt to interpret the "case or controversy" requirement of Article III, Section 2 of the United States Constitution, nor could Congress constitutionally pass an act interpreting this provision differently than this Court interpreted it in *Lane v. Williams*. Insofar as Spencer is alleging an intent to require expedited handling of parole revocation cases consistent with the "case or controversy" clause, there is absolutely no evidence in the text to support this. *See* 28 U.S.C. §§ 2254, 2261-2266. In any event this intention would not overcome the fact that no "case or controversy" has existed since August 1993. Spencer's first argument essentially seeks to expand federal jurisdiction without any constitutional or statutory support, based on his own view that it is unfair that his claim became moot while it was being adjudicated. Spencer's claim that his habeas corpus petition is not moot must stand or fall based on whether a "case or controversy" exists that creates jurisdiction for review. Spencer's first argument contributes nothing to establish such jurisdiction.

The path Spencer advocates is an impractical and unnecessary change from well established doctrines. The ultimate end of this path would be a judicial system very different from the one that now exists. Consideration of Spencer's proposed right to a federal forum together with his broad view of injuries sufficient to create jurisdiction dramatically points out the impracticality of his arguments and why the law is what it is, not what Spencer would like it to be. There is no constitutional right to a federal forum sufficient to overcome the "case or controversy" requirement and by implication the statutory requirements of exhaustion and custody in habeas corpus cases. If there were, any person who is or has been under arrest or who has paid a traffic ticket could pursue habeas corpus relief if he could show a sufficient injury. Since an arrest could be used in

questioning of a character witness, or could be considered in discretionary sentencing decisions, or could be part of a showing of character in a capital murder in penalty phase, a "case or controversy" would exist. Therefore an action filed in habeas corpus would exist for the expungement of state arrest records. Similarly a traffic violation could enhance future penalties for future violations and would also create a cause of action in federal habeas corpus. If the law were as Spencer argues it should be, these admittedly extreme examples logically should be permitted to occur. The law is, however, that there is no jurisdiction for review absent a "case or controversy" as this Court has defined the term. It should not change.

Conclusion

For the foregoing reasons, Respondent prays the Court affirm the judgment of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

RANDY G. SPENCER,

Petitioner,

v.

MICHAEL L. KEMNA and JEREMIAH W. (JAY) NIXON,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

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25 pp

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

ARGUMENT

I. The collateral consequences of the State of Missouri's official finding that Spencer committed three felonies satisfy the applicable requirements of nonmootness under both Article III and 28 U.S.C. § 2254.

For the first time, the respondents argue in their brief before this Court that Spencer has not met the constitutional "case or controversy" criterion for federal court jurisdiction. Respondents' Brief (RB) 9 & 14-19. A party's raising such an issue at the eleventh hour suggests that the objection may be less persuasive than that party now asserts it to be. *Cf. Gomez v. United States District Court*, 503 U.S. 653, 654 (1992).

A. The same factors that establish jurisdiction under 28 U.S.C. § 2254 and this Court's decisions construing it suffice to establish a "case or controversy" under Article III.

A habeas corpus action does not become moot when the petitioner is released after having filed his or her petition. *Carafas v. LaVallee*, 391 U.S. 234, 237 (1968). In no post-*Carafas* decision has this Court suggested that in order to support jurisdiction under Article III, the petitioner must be incarcerated or under threat of execution throughout *every* stage of the proceedings before the district court, the court of appeals, and this Court. Collateral consequences continue to exist throughout the proceedings that keep alive the underlying claims.

In *Sibron v. New York*, 392 U.S. 40, 57 (1968), the Court held that one must *presume* criminal convictions to have collateral consequences supporting jurisdiction after the prisoner's release. To overcome the presumption, the respondent must show that "there is no possibility that any collateral consequences will be imposed on the basis of the challenged conviction." Unlike the amici from seventeen states, the respondents do not appear to challenge *Sibron*. Instead, the respondents now argue that there is a difference *of constitutional proportion* between the collateral consequences of a

parole revocation for forcible rape, armed criminal action, and possession of a controlled substance, on the one hand, and a criminal conviction for passing an insufficient funds check, on the other. On the respondents' account, the collateral consequences of an official finding that a petitioner passed a bad check satisfy Article III, whereas the collateral consequences of an official finding that a petitioner was guilty of forcible rape, armed criminal action, and crack cocaine possession do not. Such a captious distinction does not make a constitutional difference.

Respondents refer to a three-pronged test on the basis of which they deny that Spencer's claims present a "case or controversy" within the meaning of Article III. RB 14-16. They pull this test out of several purely civil cases. Respondents cite no habeas corpus case in which this Court applied the test they now proffer.

As this Court has frankly acknowledged, the distinction between the constitutional "case or controversy" requirement and the prudential considerations of justiciability is not a bright line. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471 (1982). In *United States Parole Commission v. Geraghty*, 455 U.S. 388, 400 (1980), the Court characterized the Article III mootness doctrine as "flexible." Mootness is a more flexible concept than standing, because it is one thing to hold that a person should not be in federal court in the first place, and another thing to hold throw a person out of federal court – when he or she was properly there – because of intervening events for which he or she is not responsible.

In applying its criteria for Article III standing, this Court has been aware of the consequences of its decisions. Excluding this case from the category of "cases or controversies" in the constitutional sense would allow government officials to deny constitutional rights with impunity.

In none of the "case or controversy" decisions that the respondents now cite, moreover, did the Court deal with an action that the Framers marked out for special protection. U.S. Const. art. I, § 9, cl. 2. Before the Framers and the People of the United States created the federal judiciary and

constitutionally defined its jurisdiction, the privilege of the writ of habeas corpus existed. The Suspension Clause of Article I refers to a privilege that the People's grant of *any* power to the central government presupposed. This clause uses the passive voice, rather than limiting its prohibition to Congress or the states: *no one* shall suspend the privilege, "unless in Cases of Rebellion or Invasion the public Safety may require it." Although the Judiciary Act of 1789, 1 Stat. 82, did not extend federal habeas corpus jurisdiction to persons under state custody, there is no basis for suggesting that a habeas corpus action is not a "case or controversy" within the meaning of Article III.

Adopting the position of the court below would be a de facto suspension of the writ of habeas corpus as applied to probationers and parolees, because the reader of any such opinion would know exactly what to do to prevent this category of Americans from obtaining federal judicial relief from unlawful detention. In this special context, one must apply with care, if at all, the judicially crafted doctrine in the general civil cases on which the respondents rely. These general civil cases do not take into account the Suspension Clause and the values running back to Magna Carta that it reflects. They do not take into account the decisions of this Court setting the metes and bounds of this separate, preexisting remedy. They do not take into account all of the applicable reported decisions of the circuits other than the court below, which follow *Evitts v. Lucey*, 469 U.S. 397, 391 n.4 (1985), as to official findings of criminal wrongdoing other than convictions. As the facts of this case illustrate, there is a high abuse potential if respondents can avoid both habeas corpus scrutiny and civil liability in probation and parole revocation cases by delaying their responses, and if district courts can insulate their work from review by delaying their decisions. Whether or not the Suspension Clause guarantees that a given claim is cognizable in federal habeas corpus, any claim that *is* cognizable in federal habeas corpus is a "case or controversy" as the Framers defined "the judicial Power of the United States."

In any event, in this action the same factors that suffice for jurisdiction under section 2254 and this Court's precedents applying it should also suffice to establish a "case or controversy" under Article III.

As this Court expressed the "case or controversy" limitation on federal jurisdiction in *United Food & Commercial Workers Union Local 751 v. Brown Group*, 116 S.Ct. 1529, 1533 (1996), it requires "(1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision."

Here, the "injury in fact" is the official finding that Spencer is guilty of forcible rape, armed criminal action, and possession of a controlled substance (crack cocaine). The immediate consequence of this injury is that the State of Missouri returned Spencer to its Department of Corrections. The collateral consequences are the ones this Court identified in *Evitts* in respect to criminal convictions, as well as prejudice to his consideration for parole in the future, subjection to inherently prejudicial evidence under Fed. R. Evid. 413, and disentitlement from seeking damages under section 1983.

There is a causal connection between Spencer's injury and the conduct of the parole personnel, because *but for* the constitutional violations in the revocation process, the hearing panel would not have found Spencer guilty of these three instances of criminal misconduct, and he would not have the revocation on his record. These constitutional violations related directly to the reliability of the factfinding that resulted in the revocation. As Spencer has documented in his opening brief at 31, if Spencer had been guilty of the alleged offenses for which the State of Missouri revoked his parole, his sentencing exposure would have been two consecutive life sentences. If the State of Missouri had had a case against Spencer which would have withstood proper notice, representation, and an opportunity to cross-examine the witnesses against him – the principal rights it denied him in the parole revocation proceedings – it would have *prosecuted* him for these offenses. Instead, it imprisoned him for the remainder of a three-year term for burglary and stealing, and branded him

with the stigmata that the respondents now find it convenient to depreciate before this Court.[1]

This injury is amenable to judicial relief. An order expunging the parole revocations would relieve Spencer from the testimonial impeachment, sentence enhancement, Rule 413 prejudice, and parole consideration consequences, and would allow him to bring an action for damages under 42 U.S.C. § 1983. Notwithstanding the respondents' arguments (*e.g.*, RB 26, 28 & 32), the ongoing effects of the injury arise from the order of revocation, not from the alleged underlying conduct. These allegations are *nothing* without the imprimatur of the State of Missouri.

In this special area of litigation, the harms to Spencer and the risk of abuse by respondents are grave enough that the purposes of the three-factor test this Court has identified in general civil litigation cases support Article III jurisdiction.

In further reply to the respondents' recent invocation of the "case or controversy" defense, Spencer observes that the realism this Court has expressed in developing the "capable of repetition, yet evading review" doctrine ought to play a part in its analysis here. Insofar as this doctrine once applied *only* to cases where the *same* plaintiff or petitioner would be burdened by the defendant's or respondent's conduct, *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911), the *principle* of this limitation has not survived *Roe v. Wade*, 410 U.S. 113 (1973).

In *United States Parole Commission v. Geraghty*, 445 U.S. at 398, this Court observed that the "capable of repetition, yet evading review" doctrine "was developed outside the class-action context," and applies when "the litigant faces

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[1] Respondents attempt to avoid the causal link between the constitutional violations and the resulting injury by asserting that if a person is subject to enhanced sentencing for a future offense, *he or she* is the "intervening cause." RB 21. If accepted, this premise would sweep away the relevant holding of *Evitts v. Lucey*, 469 U.S. 387 (1985), to say nothing of Eighth Amendment claims. One could equally avoid sentence enhancement or breaking on the wheel by not committing another crime.

some likelihood of becoming involved in the same controversy in the future," such that "vigorous advocacy can be expected to continue." It added that if there were "*no* chance that the named plaintiff's expired claim will reoccur," one must resort to class certification before the claim expires in order to avoid mootness. *Id.* at 398-99 (emphasis supplied). Accordingly, the Court held that Geraghty met the "personal stake" requirement for continuing to appeal the district court's denial of class certification in an action challenging parole guidelines, even though he had been released from prison while the appeal was pending. *Id.* at 398-407.

Other courts have applied the "capable of repetition, yet evading review" doctrine to cases analogous to Spencer's. In *People ex rel. Maxian v. Brown*, 164 A.D.2d 56, 561 N.Y.S.2d 418 (1990), *aff'd*, 77 N.Y.2d 422, 570 N.E.2d 223 (1991) (per curiam), trial-level courts held that the petitioners' prearraignment detention for more than twenty-four hours was presumptively unnecessary. By the time the parties argued the respondents' appeals, all of the petitioners had been either arraigned or released. The appellate court held that the appeal was not moot, because "the within proceedings raise important issues as to the limitations imposed by State law upon prearraignment detention." It concluded that "due to the temporary nature of the challenged detention," the claims were "capable of repetition, yet evading review" and therefore "not foreclosed by the mootness doctrine." *Id.* at 58, 561 N.Y.S.2d at 419, quoting, respectively, *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975), and *Williams v. Ward*, 845 F.2d 374, 380 n.6 (2d Cir. 1988).[2]

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[2] *Accord, People ex rel. Brown v. New York State Board of Parole*, 139 A.D.2d 548, 550, 527 N.Y.S.2d 40, 41 (1988) (habeas corpus petition challenging timeliness of parole revocation hearing not moot on expiration of sentence because "issue raised is likely to recur, is substantial and novel, and will typically evade review") (internal citation omitted). *See also Yiadom v. Kiley*, 204 Ill.App.2d 418, 424-25, 562 N.E.2d 310, 313 (1990) (petition for release from a mental institution was not moot even though the period of commitment it challenged had expired; "[o]therwise, dismissal for mootness of orders involving commitment periods of short duration might remove an entire class of cases from appellate review").

Whereas *Gerstein* and *Williams* were class actions, this vehicle is not available in habeas corpus. When, as here, the "temporary nature" of the *immediate* consequences of the respondents' or the lower courts' practices would otherwise preclude relief from the violation of the rights of persons such as Spencer, courts have found disputes to be "capable of repetition, yet evading review." There is always a category of persons whose probation or parole has been revoked, but who could not first exhaust state remedies and then litigate a federal habeas corpus action within the 359 days the respondents hold out as acceptable for processing such an action (BIO 4-5). The brevity of the six-month sentence at issue in *Sibron* was one of the factors this Court cited in its reasoning.[3]

When the practical consequences of a probation or parole revocation can far exceed those of a six-month jail sentence, there is no reason for confining this principle to convictions. Instead, the reasons for applying the "capable of repetition, yet evading review" standard include Spencer's case.[4]

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[3] "Many deep and abiding constitutional problems are encountered primarily at a level of 'low visibility' in the criminal process – in the context of prosecutions for 'minor' offenses which carry only short sentences. We do not believe the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct. A State may not cut off federal review of whole classes of cases by the simple expedient of a blanket denial of bail pending appeal. As *St. Pierre [v. United States*, 319 U.S. 41 (1943),] clearly recognized, a State may not effectively deny a convict access to its appellate courts until he has been released and then argue that his case has been mooted by his failure to do what it alone prevented him from doing." *Sibron v. New York*, 392 U.S. 40, 52-53 (1968) (footnotes omitted).

[4] When this Court held that the standard did not apply in *Lane v. Williams*, 455 U.S. 624 (1982), it did not refer to the fact that *Lane* was not a class action. Instead, it observed, *first*, that "[t]he possibility that other persons may litigate a similar claim does not save this case from mootness," and, *second*, that because the prisoners had learned – since they

Being recommitted to prison after having had one's parole revoked is in fact a stronger case than pregnancy for being flexible about mootness. Since *Lane v. Williams*, 455 U.S. 624 (1982), Congress and the state legislatures have been increasing the proportion of convicted citizens' sentences that they must serve before even being considered for parole. By contrast, there was a natural limit on the transitory nature of Jane Roe's circumstances. Given the respondents' and the district court's handling of Spencer's case, and the respondents' unrehabilitated position that this delay was perfectly legal and proper (RB 34-41), one can hardly deny that there is "some likelihood" that they will continue to behave as they did in delaying Spencer's case. If re-release or discharge moots a revokee's constitutional claims, and there is no right to have a petition ruled on before re-release or discharge (absent dilatory misconduct on the part of the petitioner), then *not only* the underlying constitutional claims, *but also* the delay and mootness issues themselves, will escape appellate review.

For these reasons, the policies and principles underlying the "capable of repetition, yet evading review" exception counsel against accepting the respondents' new invocation of Article III doctrine.

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pled guilty – about the mandatory parole term of which they did not have notice when they did so, they could not *in principle* be subject to the same constitutional violation. *Id.* at 633-34.

Neither of these factors is present in Spencer's case. If this Court does not reverse the court below, there is *no* "possibility that other persons may litigate a similar claim" if, as in Spencer's case, the respondents and the district court delay the disposition of the habeas corpus action until the probationer or parolee is re-released or discharged. In light of what happened to Spencer in 1992, and in light of the respondents' report that Spencer will be eligible for parole in 1999 (RB 8 n.1), one cannot say that he could not again be subjected to an unconstitutional parole revocation. Consequently, neither of the grounds the Court adduced for declining to find the prisoners' situation in *Lane* "capable of repetition, yet evading review" applies to Spencer's case.

B. Petitioner is not raising new or different issues for the first time in this Court.

Although the respondents insert defenses for which they cite Article III and several civil cases arising under it for the first time in their merits brief, the same respondents claim that *Spencer* cannot advance any reasons besides effects on future parole consideration as a basis for this Court's granting and reversing the judgment of the court below. RB 6, 8, 11 & n.5, 18, 21, 23-24.

Petitioner's references to testimonial impeachment, sentence enhancement, Fed. R. Evid. 413 prejudice, and preclusion of section 1983 relief are not new claims or issues, but additional argumentative support for the point Spencer raised on appeal from the district court's self-created holding of "mootness." In the cases the respondents cite in an attempt to avoid the merits, however, the parties seeking relief from this Court raised new *claims*.

In *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), this Court reversed the lower courts' holdings that the petitioner could not proceed with an action under 42 U.S.C. § 1983; in addition to advancing her grievances under that statute, the petitioner asked this Court to "revive" *different* statutory provisions and to allow her to proceed under them on remand, when it had held these provisions unconstitutional in the *Civil Rights Cases*, 109 U.S. 3 (1883). In response to this proposed expansion of the litigation that was before the court of appeals, this Court declined to consider the new issue. *Id.* at 147 n.2.

In *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 348 (1981), the district court did not award costs under Fed. R. Civ. P. 68, because the defendant corporation's putative offer of judgment was too small to be a good-faith effort to resolve the dispute. The court of appeals affirmed on the same ground. In addition to the Rule 68 point on which the court of appeals decided the case, the defendant corporation sought to raise a claim it had not raised in the court of appeals, *i.e.*, that the district court abused its discretion in not awarding costs

under a completely separate rule. This Court held that the latter claim was not properly before it. *Id.* at 363.

By providing additional reasons for resolving a claim in his favor, Spencer did not present a new claim. His *sources* for the testimonial impeachment and sentence enhancement reasons in support of his position on nonmootness were decisions *the court below cited* in its opinion holding his case moot. JA 135, *citing United States v. Parker*, 952 F.2d 31, 33 (2d Cir. 1991) (per curiam), *and Robbins v. Christianson*, 904 F.2d 492, 495-96 (9th Cir. 1990). If Spencer's counsel in this Court were *not* free to develop and emphasize the grounds of these decisions in the course of demonstrating how the decision of the court below conflicted with them, then a certiorari petition could be reduced to a transmittal letter for the petitioner's brief before the court below. Much of the argumentative development of the collateral consequences that *Parker* and *Robbins* identify took place in direct response to the *respondents'* attempt to distinguish Spencer's case from them. *Compare* Reply Brief in Support of Petition at 6-13 *with* BIO 6-8.

Spencer's citation and exposition of *Parker* and *Robbins* occurred in the course of establishing a conflict between the decision of the court below and the decisions of every other reported opinion by a United States court of appeals that has addressed the issue before this Court. Now that the Court has granted certiorari, and has the general question before it, Spencer's counsel have a duty to the Court and to their client to present *all* of the reasons for reversal that they believe to be meritorious.

For example, Fed. R. Evid. 413's freestanding threat of admitting the parole revocation for forcible rape in a federal criminal trial did not exist until after Congress adopted it in 1994. Legislative adoption of this rule changed the background against which this Court decided *Lane*.

In addition, *if* this Court adopted the position of the Eighth Circuit's lone reported opinion holding a parole revocation claim moot on similar facts – instead of the position of the several circuits that both Spencer and the seventeen amici cite – *then* under *Heck v. Humphrey*, 512 U.S. 477

(1994), Spencer would be absolutely precluded from any federal-court relief for the unconstitutional revocation of his parole. There is no argument that a claim for *damages* under section 1983 would be moot because Spencer is no longer confined pursuant to the parole revocation. But *Heck* requires him to bring *and prevail in* a habeas corpus action before he can proceed under section 1983. This consequence is part of what this Court has a right to consider in making its decision on the *issue* he raised below – whether or not the parties explored this *factor* below. It is not a separate claim, as were the claims in *Adickes* and *Delta Air Lines*.

Lest there be any doubt, Spencer does not abandon the reason set forth in his brief and argument before the court below, that the unconstitutional revocation of his parole in 1992 makes him less likely than he ought to be to receive parole again. Respondents' argument that this factor is not cognizable is absolutely unrealistic: whether or not the Board of Probation and Parole *must* take a prior revocation into account, the respondents *know* it *will*. Only their misreading of *Lane* saves this objection from utter frivolity.

C. Forfeiture of Spencer's cause of action under 42 U.S.C. § 1983 is a sufficient collateral consequence to defeat mootness.

Respondents dismiss in one paragraph the discrepancy between their position and this Court's decisions in *Heck v. Humphrey*, 512 U.S. 477, 487 (1994), and *Edwards v. Balisok*, 117 S.Ct. 1584, 1587-89 (1997). RB 32. Elsewhere they claim that this Court should accept the absolute foreclosure of any federal relief for their violations of the United States Constitution. RB 35-36. Respondents are attempting to whipsaw Spencer in order to avoid being held to account for their treatment of him before a court of another sovereign: if their position were the law, they could not only deny prisoners a day in court on their petitions for release, but also avoid any exposure for damages.

Spencer cannot believe this Court intended such a result when it made section 1983 plaintiffs' remedies for certain

claims contingent on successful litigation of an action under section 2254. To the contrary, in the case on which this Court based the *Heck* decision, the Court expressed its expectation that the district courts would process habeas corpus petitions in a "swift, flexible, and summary" or "expeditious" manner. *Preiser v. Rodriguez*, 411 U.S. 475, 498, 491 (1973). Spencer has met the Court's expectations by going to the state courts first; the respondents and the district court have failed to meet its expectations, and have instead created the situation in which all participants in this case find themselves.

Spencer does not suggest a system of outcome-determinative deadlines for the disposition of cases involving probation and parole revocations. *Cf.* 28 U.S.C. §§ 2261-66 ("fast track" for capital cases in jurisdictions that meet minimum standards for post-conviction relief representation). Respondents and the district court hold out nothing but self-serving boilerplate to justify their delay in this case. RB 37. If a district court actually *cannot* resolve a probation or parole revocation case before the petitioner is re-released or discharged, and the petitioner is free from fault in respect to the delay, then the courts should not deny the petitioner all federal relief by holding his or her habeas corpus action moot.

D. Respondents err in attempting to create a dichotomy between "present" and "future" collateral consequences.

Respondents attempt to reconcile their position with this Court's decisions by characterizing the collateral consequences of criminal convictions as "present" and those of probation or parole revocations as "future effects." RB 19-24. Respondents' false dichotomy would undercut this Court's recognition, in *Evitts*, that the availability of a prior official finding of wrongdoing for the purposes of testimonial impeachment and sentence enhancement defeats mootness. If a disability does not defeat mootness because it is not "present," but is somehow contingent on being the victim of a tort or the defendant in a criminal case, then testimonial impeachment and sentence enhancement do not defeat mootness in

respect to a criminal conviction. Whether the official finding of wrongdoing is a criminal conviction or a parole revocation, in contemporary America it is like having one's ear cut off in medieval England.

Having one's right to damages foreclosed is also a "present" detriment, whether or not one has filed a section 1983 action. In *Town of Newton v. Rumery*, 480 U.S. 386 (1987), this Court held that the defendant could waive his right to file an action under section 1983 in consideration for dismissal of criminal charges against him. His cause of action was a present right, which he could bargain away. Spencer's section 1983 claims are present causes of action, but ones that, under *Preiser*, he cannot pursue until he has litigated a habeas corpus action.[5]

E. Testimonial impeachment and sentence enhancement are collateral consequences of probation or parole revocation.

At various points in their attempt to avoid the consequences for their case of the consequences of a parole revocation for Randy Spencer, the respondents suggest that Spencer can always argue, at a future trial, that the accusations on the basis of which the Board revoked his parole were not true. RB 25, 26, 30 & 32. This Court anticipated their reasoning in *Sibron* when it said, of criminal convictions, "the sooner the issue is fully litigated the better for all concerned."[6] This

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[5] Even the court below acknowledged that the pendency of a section 1983 claim suffices to keep a habeas corpus action attacking the same physical custody from becoming moot on the cessation of the physical custody. *Leonard v. Nix*, 55 F.3d 370, 373 (8th Cir. 1995). The court below cited this decision in its opinion holding Spencer's claims moot, but failed to acknowledge its applicability. RB 134.

[6] 392 U.S. at 56-57. The Court continued: "It is always preferable to litigate a matter when it is directly and principally in dispute, rather than in a proceeding where it is collateral to the central controversy. Moreover, litigation is better conducted when the dispute is fresh and additional facts may, if necessary, be taken without a substantial risk that witnesses will die

Court's insight applies with *greater* force to parole revocations, in that a person who has been convicted of a *crime* has had the full benefit of the protections in the Bill of Rights, whereas a parole revocation can be based on a much lower showing than a criminal conviction.

1. An adverse party can use a probation or parole revocation to impeach the credibility of a witness, so long as the adversary articulates an acceptable reason and does not otherwise prejudice the witness.

In *State v. Greer*, 39 Ohio St.3d 236, 530 N.E.2d 382 (1988), *cert. denied*, 490 U.S. 1028 (1989) – a capital case – the defendant had testified and had denied any participation in the murder for which he was on trial. The prosecution cross-examined him, asking if he had not been on parole, but returned to prison for a parole violation. The Ohio Supreme Court approved of this impeachment, by presenting the violation as conduct bearing on his credibility:

> As the term "parole" implies, the one released upon parole must, as a condition precedent to his release, *promise* to observe certain terms and conditions. As such a violation of parole constitutes a specific instance of failure to keep his word. Such a failure is almost always "probative of truthfulness or untruthfulness" and is therefore an appropriate subject for impeachment-oriented cross-examination.

39 Ohio St.3d at 243, 530 N.E.2d at 393-94 (emphasis in the original).

In *Kopacek v. State*, 567 P.2d 102 (Okla. Crim. App. 1977), a defendant testified on direct examination that he had been convicted of three prior felonies. On cross-examination, the prosecutor began adducing additional facts about the time

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or memories fade. And it is far better than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State's right to impose it on the basis of some past action."

the defendant had served. The prosecutor asked about a release on parole, and in response to a subsequent question the defendant testified that he was returned to prison for a parole violation. Defense counsel objected, and the court overruled the objection. The Oklahoma Court of Criminal Appeals affirmed, reasoning that because the defendant had testified that he had been convicted of three felonies, the prosecutor could adduce testimony about the parole violation "to show the jury that they have not been given a complete account of his criminal record." *Id.* at 105.

State v. Comstock, 647 S.W.2d 163 (Mo. Ct. App. 1983), illustrates how Missouri law follows the general pattern of allowing impeachment with parole revocations at the drop of a hat. The prosecutor asked a question that he knew or should have known the defendant would answer by saying that his probation had been revoked; the defendant answered truthfully. The jury heard the answer. The Missouri appellate court held that defense counsel made the wrong objection, and made it too late. *Id.* at 165. In addition, the court held that the prosecutor *properly* cross-examined the defendant about his probation revocation by using it to counter his testimony that he would not have engaged in the prison sodomy for which he was on trial, because he would have been eligible for parole four days after the incident. *Id.* at 165-66. *Accord*, *State v. Gainey*, 280 N.C. 366, 374, 185 S.E.2d 874, 880 (1972) (defendant explained flight by saying he was on parole and not supposed to be out after midnight; prosecutor properly cross-examined him by asking if he had not been found to have committed other parole violations).

Respondents attempt to belittle the impact of such testimonial impeachment by citing *State v. Newman*, 568 S.W.2d 276, 278-82 (Mo. Ct. App. 1978). RB 29. *Spencer* had cited *Newman* in his reply brief in support of certiorari (at 8 n.2), correctly noting that *Comstock* distinguished it. In *Newman* a Missouri appellate court held that a prosecutor exceeded the proper scope of cross-examination by "amplify[ing] the prior convictions" to which the defendant had testified on direct examination. This lengthy cross-examination included the *details* of the defendant's parole revocation and criminal

convictions, as well as drug and alcohol abuse, plea-bargaining, and other prejudicial matter. *Id.* at 278-81. The State of Missouri argued that this combination of prejudicial matter was nonetheless admissible. *Id.* at 277. The court disagreed, reaffirming the rule that "[t]he prosecution is entitled to show only 'the nature and number' of prior convictions, and is not entitled to engage in cross-examination of the defendant with respect to details of the prior crimes." *Id.* at 281, *citing State v. Scott*, 459 S.W.2d 321 (Mo. 1970).

Although it mentioned "breach of parole" as one such detail, *Newman* is not authority for the proposition that a parole revocation is inadmissible to impeach a witness. If the prosecutor had attempted to justify the use of a parole violation on the ground that it undermined the defendant's truthfulness, as in *Greer*, or that it undercut his explanation of something he had done or not done, as in *Comstock*, his overall cross-examination may still have led to reversal, but the reversal would have been in spite of the questioning on the parole revocation.

2. Probation and parole revocations have sentence enhancement consequences apart from the accusations of primary conduct on which they rely.

A probation or parole revocation has significant consequences under the U.S. Sentencing Guidelines. The revocation *must* be used in determining whether a prior conviction is counted in criminal history, and *may* be used as a ground for departing upwardly from the guideline sentence range.

In determining criminal history, these guidelines count prior sentences that occurred within the past fifteen years or that imposed incarceration into the fifteen-year period. When a defendant's probation or parole is revoked, and he or she is incarcerated on revocation, that incarceration counts as a prior sentence. *See* U.S.S.G. § 4A1.2(e)(1). Thus, revocation is likely to cause a sentence that would otherwise fall outside the fifteen-year limit in section 4A1.1 to fall within the

fifteen-year period, and be counted as part of the defendant's criminal history in any future federal criminal case.

Section 4A1.3 allows an upward departure when "reliable information" shows that a defendant's criminal history as calculated under section 4A1.2 does not "adequately reflect the seriousness of [his or her] past criminal conduct or the likelihood that [he or she] will commit other crimes." In Spencer's case, it is *only* the parole revocation that could possibly count as "reliable information" to the effect that he was guilty of the criminal misconduct of which the State of Missouri accused him in moving for revocation. It is this official finding of criminal misconduct, not any underlying "fact," that would support an upward departure. For all of their effort to depreciate the seriousness of the order of revocation, the respondents do not suggest that an order of the Board of Probation and Parole is not "reliable."

Respondents disparage the effects of parole revocations under the Missouri Sentencing Guidelines by observing that they are "purely advisory." RB 26. They are more than mere "advice," however, in that these official, statewide pronouncements will foreseeably set the expectations of the parties in plea negotiations. Like the Board's official finding that Spencer committed forcible rape, armed criminal action, and possession of crack cocaine, the Missouri Sentencing Guidelines lend the imprimatur of the sovereign to what might otherwise be the opinion of a few citizens – let alone triple hearsay from a crackhead.

II. *Lane v. Williams* does not support the foreclosure of all federal remedies when the delay in disposition of the habeas corpus action resulted from the exhaustion of state remedies and the behavior of the respondents and the district court.

Respondents argue that *Lane v. Williams*, 455 U.S. 624 (1982), had a *constitutional* basis (and was constitutionally *compelled*) even though this Court indicated no such basis for its holding. RB 14, 19 & 40. Respondents' revised version of

Lane reads too much into it and too little from the rest of the Court's applicable decisions.

In *Lane*, two Illinois prisoners, Williams and Southall, sought to challenge their *underlying sentences* based on pleas of guilty. Their intervening release on parole, revocation, return to custody, re-parole, and complete discharge from custody had nothing to do with their attack on the voluntariness of their pleas. Each of these prisoners contended that his guilty plea was invalid because neither the sentencing judge nor anyone else had informed him of a mandatory parole term he would need to serve after his sentence of imprisonment. This Court recognized this distinguishing fact when it said: "[Williams and Southall] have never attacked, on either substantive or procedural grounds, the finding that they violated the terms of their parole." 455 U.S. at 633.

Unlike the prisoners in *Lane*, Randy Spencer does not question his underlying sentence or the legitimacy of the term of parole supervision to which the State of Missouri subjected him. Instead, he maintains that when the State of Missouri has revoked his parole in violation of the Constitution of the United States, and when he has exhausted his state-court remedies for the State's constitutional violations, he has a right to a judicial remedy in the courts of the United States.

In *Lane*, the district court's order granting relief did not require the prisoners' custodian "to expunge or make any change in any portion of [the prisoners'] records," nor had the prisoners "*ever* requested such relief." 455 U.S. at 634 n.14 (emphasis supplied). Here, Spencer's opening brief in the court below prayed, as his first choice for relief, that the court "absolve [his] record of the alleged parole violation." Brief of Appellant at 36. Spencer continued to seek this relief through oral argument before the court below.

This Court decided *Lane* before its decision in *Heck* clarified the sequence in which probationers and parolees must bring their challenges to revocations in order to seek damages under section 1983. It decided *Lane* before it recognized testimonial impeachment and sentence enhancement as collateral consequences of convictions in *Evitts*. It decided *Lane* before Congress made sex offense findings such as the

Board's order against Spencer independently admissible in federal sex-offense trials.

In *Lane* there was no record that the custodians or the district court had *caused* the prisoners' claims to become "moot" by delaying their response or the disposition in the prisoner's habeas corpus action. Here, the respondents do not deny that the same district court sets different deadlines for cases involving executions and extraditions, but maintain that "logic, fairness and habeas law" support the district court's failure to take account of the time-sensitivity of probation and parole revocation cases, even when, as here, the petitioner's impending release was undisputed and appeared on the face of the pleadings. RB 38-39. Unlike the case before this Court in *Lane*, this is one in which a ruling for the state would mean that its attorneys and the district court could deny the petitioner *any relief at all* for the state's violation of his federal rights simply by delaying the disposition of the case.

Thus, Spencer does not ask the Court to overrule any of its precedents. The court below and the respondents have misread *Lane* to bar petitions different from the one it involved. The judgment must be reversed.

CONCLUSION

WHEREFORE, the petitioner renews his prayer for the Court's order that the judgment of the court below be reversed, and for such other relief as law and equity indicate.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

RANDY G. SPENCER,

Petitioner,

v.

MICHAEL L. KEMNA, et. al,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE STATE OF CALIFORNIA, ET. AL., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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17 pp

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES, CONT'D

TABLE OF AUTHORITIES, CONT'D

INTEREST OF AMICUS CURIAE

Amici curiae are states that have an interest in avoiding substantial expenditures of resources in the federal courts litigating whether a petition for writ of habeas corpus is moot after the petitioner is released from state custody. In the wake of this Court's conflicting decisions on the issue, a number of circuit courts have adopted approaches to the mootness issue that are inconsistent with a sound and reasoned application of the jurisdictional requirement in Article III of the Constitution. Amici curiae seek to reaffirm the constitutional limits on the authority of the federal courts to review state court judgments.

SUMMARY OF ARGUMENT

In *Lane v. Williams*, 455 U.S. 624, 631-633 (1982), this Court set forth a concrete, workable test of "collateral consequences" that establish a continuing case or controversy after a federal habeas petitioner is released from state custody. However, in dicta in *Evitts v. Lucey*, 469 U.S. 387, 391 n. 4 (1985), this Court harkened back to earlier decisions which employed a far more expansive test. Relying on that dicta, the lower courts have largely ignored or distinguished *Lane*, thereby eroding the mootness doctrine to the point of complete elimination in some circuits. In order to preserve the jurisdictional requirement mandated by the Constitution, this Court should reaffirm *Lane*'s holding that the federal courts can decide a habeas corpus action after the petitioner is released from custody only when the collateral consequences of the challenged criminal proceeding trigger "existing civil disabilities" that survive completion of the sentence. *Lane* at 632 & n. 13. This Court also should reaffirm *Lane's* placement of the burden on the petitioner to identify the specific collateral consequences that outlive his release from custody. *Id.* at 633 n. 13. Such limits are vital in order to safeguard from extinction the Constitution's case or controversy requirement as it applies on habeas corpus.

ARGUMENT

THE "COLLATERAL CONSEQUENCES" THAT MAY OVERCOME MOOTNESS AFTER A HABEAS PETITIONER'S RELEASE FROM CUSTODY SHOULD BE LIMITED TO "EXISTING CIVIL DISABILITIES" THAT SURVIVE COMPETION OF THE SENTENCE

Article III of the Constitution confers jurisdiction on the federal courts to hear only those actions where a genuine case or controversy exists. This guarantees that the federal courts will decide cases involving live issues that actually affect the rights of the litigants, not those involving moot or abstract propositions. *North Carolina v. Rice,* 404 U.S. 244, 246 (1971). The resolution of this question "is essential if federal courts are to function within their constitutional sphere of authority." *Id.*

A case must be dismissed as moot "when, by virtue of an intervening event, a court of appeals cannot grant 'any effectual relief whatever' in favor of the appellant." *Moore v. Calderon,* 116 S.Ct. 2066, 2067 (1996) (per curiam) (citation omitted). This Court has "furnished contradictory signals" as to when a federal court can grant effectual relief on habeas corpus after a criminal defendant's sentence has expired. *See Robbins v. Christianson,* 904 F.2d 492, 496 (9th Cir. 1990) (Noonan, J., dissenting). Historically, the writ lies only to terminate wrongful confinement. *Fay v. Noia,* 372 U.S. 391, 430-431 (1963). However, this Court has created an exception to the mootness doctrine where "collateral legal consequences" flow from the challenged criminal proceeding, even after the defendant is released from custody. *Sibron v. New York,* 392 U.S. 40, 53-54 (1968). The unresolved question is what constitutes such a collateral consequence.

In *Carafas v. LaVallee,* 391 U.S. 234 (1968), this Court held that the defendant's habeas petition was not moot after the expiration of his sentence, because under New York law his

felony conviction prevented him from engaging in business activities, voting, and serving as a juror or labor union official.[1] *Id.* at 237-238. The statutory disabilities on which the Court relied were those that had a current adverse effect on the defendant.

This Court expanded the *Carafas* doctrine in *Sibron v. New York*, 392 U.S. 40, by holding broadly that after a defendant has completed the sentence the case is moot only if there is "no possibility that any collateral legal consequences" will result from the conviction. The Court acknowledged that in its early cases it had required the defendant to identify the collateral consequences that outlived custody, but in subsequent cases the Court in effect presumed that collateral consequences existed after the defendant's release. *Sibron* at 54-55; *compare St. Pierre v. United States*, 319 U.S. 41 (1943), *with Pollard v. United States*, 352 U.S. 354 (1957). The *Sibron* Court found that none of the "concededly imperative policies behind the constitutional rule against entertaining moot controversies" would be served by dismissing the case before it, because under New York law Sibron's misdemeanor conviction could be used to enhance his sentence in future criminal proceedings and to impeach his character in a future trial. *Sibron* at 55-57.

In *Lane v. Williams*, 455 U.S. 624 (1982), this Court took a much narrower view of collateral consequences. In that case, the two defendants contested their reincarceration for parole violations because they were not advised of the state's mandatory parole period. The Court placed the burden of rebutting the state's mootness argument back on defendants,

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1. In *Carafas*, the Court also found that the defendant met the *statutory* "in custody" requirement, because he was incarcerated when he filed the habeas petition. 391 U.S. at 238-239. However, in order to demonstrate *constitutional* jurisdiction, "an actual controversy must be extant at all stages of review, not merely at the time the complain is filed." *Steffel v. Thompson*, 415 U.S. 452, 459 n. 10 (1973). As statutory mootness is not at issue here, Spencer's discussion of it in his opening brief is irrelevant. *See* Brief for Petitioner at 32-33.

stating, "Collateral review of a final judgment is not an endeavor to be undertaken lightly. It is not warranted absent a showing that the complainant suffers actual harm from the judgment that he seeks to avoid." *Id.* at 633 n. 13. The Court emphasized that no "existing civil disabilities" stemmed from the finding that the defendants had violated parole, as was the case in *Carafas* and *Sibron*, where additional penalties based on the convictions were prescribed by state law. *Id.* at 632 n. 13. Moreover, although Illinois law permitted the parole board to consider these revocations in future parole determinations, the defendants were "able -- and indeed required by law -- to prevent such a possibility from occurring," by refraining from committing additional crimes. *Id.* at 632-33 n. 13. The Court also rejected the notion that the defendants' employment prospects or the possibility of future sentence enhancements constituted collateral consequences, because an employer or judge could consider the conduct underlying the parole revocations even if the findings were vacated. *Id.* at 632-633.

Subsequently, in dicta in *Evitts v. Lucey*, 469 U.S. 387 (1985), this Court stated in a footnote that the defendant's challenge to his criminal conviction was not moot despite his release from custody and the restoration of his civil rights. Without citing *Lane*, the Court appeared to adopt an even broader test of collateral consequences than it had used in *Sibron*, implying that constitutional jurisdiction existed unless and until the defendant was actually *pardoned*, because his conviction still subjected him to persistent felony offender prosecution and potential impeachment in future proceedings. *Id.* at 391 n. 4; *see also Minnesota v. Dickerson*, 508 U.S. 366, 371 n. 2 (1993) (although no statutory disabilities attached to drug charge that was dismissed upon successful completion of diversion, habeas challenge was not moot because state law allowed "use" in future criminal proceedings).

In the wake of these Supreme Court cases, some circuit courts have effectively deleted the constitutionally mandated case or controversy requirement in habeas corpus cases. In *Chacon v. Wood*, 36 F.3d 1459 (9th Cir. 1994), the

Ninth Circuit found that the *Sibron* "presumption" that collateral consequences result from a criminal conviction is "irrebuttable," because "[o]nce convicted, one remains forever subject to the prospect of harsher punishment for a subsequent offense as a result of federal and state laws that either already have been *or may eventually be passed.*" *Id.* at 1473 (emphasis added). A subsequent Ninth Circuit panel reluctantly followed *Chacon* as circuit precedent, although it believed the case was moot because the defendant had not alleged or proven that he would suffer any collateral consequences as a result of his misdemeanor convictions. *Larche v. Simons,* 53 F.3d 1068, 1069-1071 (9th Cir. 1995). The *Larche* court stated, "To allow the Great Writ to be used in extremely minor cases, after sentences have been served, in the name of defendants *who may not face, or perhaps are not concerned with, potential collateral consequences,* is not only to cheapen the writ, but also to invite an onslaught of litigation into the federal judiciary." *Id.* at 1071 (emphasis added).

The Seventh Circuit also has established a virtually irrebuttable presumption of collateral consequences based on theoretical future events. In *D.S.A. v. Circuit Court Branch 1,* 942 F.2d 1143 (7th Cir. 1991), *cert. denied*, 502 U.S. 1104 (1992), the 11-year-old minor challenged a juvenile adjudication that admittedly did not trigger the "civil disabilities 'ordinarily resulting from the conviction of a crime.'" *Id.* at 1148. Relying on *Evitts* over *Lane,* the court found sufficient collateral consequences from the possible use of the adjudication in an adult presentence report or in future juvenile proceedings, for impeachment purposes if the minor were ever a witness, and in any future child custody proceeding, *including one involving the custody of her own as yet unborn children. Id.* at 1148-1150. In dissent, Judge Easterbrook contended the court had exceeded its constitutional jurisdiction by relying on factors that did not qualify as "civil disabilities," because none was "a legal disability imposed by the government." *Id.* at 1154. He also strongly criticized the court for taking the view that "a case is not moot

unless there is zero probability that the judgment will ever affect the future interaction of the parties." *Id.* at 1155.

In the context of challenges to probation or parole revocations, several circuits have relied on the *Evitts* footnote to find no mootness, notwithstanding the authority of *Lane* on that specific issue. In *Robbins v. Christianson,* 904 F.2d 492, 495-496 (9th Cir. 1990), the Ninth Circuit found that collateral consequences survived the defendant's disciplinary proceeding for drug use while on conditional release, because he would be subject to greater penalties under the federal sentencing guidelines if he ever violated federal law in the future, and he might lose a job if a potential employer happened to learn about the proceeding. Similarly, in *United States v. Parker,* 952 F.2d 31, 33 (2d Cir. 1991), the Second Circuit found the case was not moot because under New York law a probation violation could influence the possibility of parole on a subsequent unrelated charge.

Other courts also have eliminated immediacy and substituted remote possibility as the test of collateral consequences, thereby contributing to the erosion of the constitutional jurisdiction requirement. *E.g., United States v. Schmidt,* 99 F.3d 315, 317 (9th Cir. 1996) (90-day sentence for probation violation admittedly had no "direct affect" on future sentences, but could "indirectly" affect sentence under federal guidelines); *Sanchez v. Mondragon,* 858 F.2d 1462, 1463 n. 1 (10th Cir. 1988) (unspecified collateral consequences resulting from "unpardoned" conviction were sufficient to preclude mootness); *Reimnitz v. State's Attorney of Cook County,* 761 F.2d 405, 408 (7th Cir. 1985) (case not moot because of possibility that conviction "might someday be used to enhance his punishment for a later crime"); *United States v. Maldonado,* 735 F.2d 809, 813 (5th Cir. 1984) (misdemeanor challenge not moot because of possibility of future sentence enhancement, impeachment, and bail ramifications).

Thus, if the mootness doctrine is to survive at all, this Court should reaffirm *Lane*'s holding that only "existing civil disabilities," i.e., sanctions imposed by law that have a current

adverse effect on the defendant, constitute collateral consequences. *Lane* at 632 & n. 13. This test of collateral consequences would ensure that federal courts function within their constitutional sphere of authority, resulting in greater finality of state court judgments. It would also bring predictability and uniformity to the determination of federal jurisdiction. Further, in the interest of clarity and consistency, this approach should apply equally to challenges to both criminal convictions and revocations of probation or parole.

The *Lane* approach also would prevent the circuit courts from "[u]sing teensy possibilities of extra-legal effects to find a continuing case or controversy." *D.S.A. v. Circuit Court Branch 1,* 942 F.2d at 1155 (Easterbrook, J., dissenting). A claim that is moot should not be revived by a conjectural consequence that is essentially unripe because it depends on "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Thomas v. Union Carbide Agric. Products Co.*, 473 U.S. 568, 580-581 (1985). Thus, like claims that fail to meet Article III jurisdiction because they are insufficiently real and concrete, *see Babbitt v. United Farm Workers Union*, 442 U.S. 289, 304 (1979), the possibility of a future sentence enhancement that may occur if the defendant ever commits another crime is too theoretical and uncertain to overcome mootness. *Lane* at 632-633 n. 13. A fortiorari, the possibility of a future sentence enhancement under legislation that "may eventually be passed," see *Chacon v. Wood*, 36 F.3d at 1473, is so wildly speculative that it could never constitute an "existing" civil disability. As this Court noted in *Lane,* "Collateral review of a final judgment is not an endeavor to be undertaken lightly." *Lane* at 633. Reaffirmation of the *Lane* approach would restore the constitutionally mandated jurisdictional requirement to habeas corpus cases.

Additionally, this Court should adopt *Lane*'s holding that the defendant bears the burden to show "actual harm from the judgment that he seeks to avoid." *Lane* at 633 n. 13; *see St. Pierre v. United States,* 319 U.S. at 43 (case was moot after defendant was released from custody because he had not "shown

that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied"); *see also North Carolina v. Rice,* 404 U.S. at 248 (case remanded because record did not show "whether there may be benefits to respondent under North Carolina law in having his sentence reduced after he has served that sentence;" burden of proof on remand was not specified but appeared to fall on defendant).

The "presumption" employed in *Sibron* requires the state to prove a globally broad negative, i.e., that there is "no possibility that any collateral legal consequences will be imposed." *Sibron* at 57. However, the defendant clearly is in the best position to identify the particular collateral consequences that concern him. *See, e.g., Ginsberg v. New York,* 390 U.S. 629, 633-634 n. 2 (1968) (defendant's conviction for selling erotic magazines to minor subjected him to revocation of his license to run diner under local municipal law). Thus, once the state shows that the petitioner has been released from custody, he should bear the burden to show that he continues to be subject to collateral consequences despite the expiration of his sentence.

CONCLUSION

For the reasons stated, amici curiae respectfully ask this Court to restrict the "collateral consequences" that establish a continuing case or controversy after a petitioner's release from custody to "existing civil disabilities" that result from the challenged criminal proceeding, and to place the burden on the petitioner to identify those specific collateral consequences.

Dated: July 22, 1997.

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No. 96-7171

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

RANDY G. SPENCER,
Petitioner

v.

MICHAEL L. KEMNA, et al.,
Respondents

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CERTIFICATE OF SERVICE BY MAIL

PEGGY S. RUFFRA, a member of the Bar of the Supreme Court of the United States, states:

That her business address is 50 Fremont Street, Suite 300, in the City and County of San Francisco, State of California; that on July 23, 1997, she served three true copies of the **BRIEF OF THE STATE OF CALIFORNIA, et al., AS AMICI CURIAE IN SUPPORT OF RESPONDENT** in the above-entitled matter on the parties by placing same in envelope addressed as follows:

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Said envelope was than sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid.

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